CLERK'S COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 524.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE CORONADO BEACH COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Citation and service	a	1
Writ of error	c	2
Names and addresses of counsel	1	3
Bill of complaint	2	3
Answer	7	6
Reply	20	15
Judgment	25	17
Verdict	26	18
Special interrogatories directed by the court	27	18
Notice of intention to move for new trial	34	22
Order denying motion for new trial, etc	37	23
Proposed bill of exceptions	39	24
Plaintiff's Exhibit 1. Affidavit of Pedro C. Carrillo	41	25
Plaintiff's Exhibit 2. Grant to Pedro C. Carrillo	42	26
Plaintiff's Exhibit 3. Deed to Pedro C. Carrillo	43	27
Plaintiff's Exhibit 4. Petition of Billings et al	45	28
Plaintiff's Exhibit 5. Opinion, Farwell, commissioner	52	32
Plaintiff's Exhibit 6. Case of Billings v. The United States, in United States District Court for Southern District of California	53	33
Order reversing land commissioners	53	33
Order of substitution	55	34
Answer	56	35
Plaintiff's Exhibit 7. Patent United States to Peachy & Aspinwall	58	36
Plaintiff's Exhibit 8. Appeal for rehearing	62	38

	Original.	Print.
Plaintiff's Exhibit 9. Mandate of Supreme Court, United States	63	39
Defendant's Exhibit A. Decree	65	40
Colloquy between court and counsel	68	41
Testimony of Howard C. Holmes	73	44
Louis C. Masten	91	54
Howard C. Holmes (recalled)	98	58
George Burnham	108	64
Ford A. Carpenter	116	69
George L. Barney	119	71
John D. Spreckels	126	75
Paul I. Welles	132	78
Louis H. Mooser	142	84
G. E. Gardner	151	90
A. O. Kelliher	157	93
Paul A. Crippen	159	95
Thomas O'Hallaran	165	98
G. E. Gardner (recalled)	167	99
Instructions to the jury	168	100
Verdict	177	106
Answers to special interrogatories directed by the court	177	106
Grounds for motion for a new trial—		
Specification of errors of law occurring at the trial	180	107
Stipulation as to exhibits	183	109
Judge's certificate to bill of exceptions	182	109
Petition for writ of error	186	110
Assignment of errors	189	111
Praecipe for record	194	113
Clerk's certificate	196	114
Stipulation and addition to record	197	115
Map	198	116

a In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT AND DEFENDANT. } No. E–34.

Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

To The Coronado Beach Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, D. C., on the 17th day of September, 1920, being within sixty days from the date hereof, pursuant to the writ of error allowed and filed in the office of the United States District Court, Southern District of California, Southern Division, in the suit numbered E–34, in the records of said court, wherein the United States of America is plaintiff in error and The Coronado Beach Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and reversed, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred and twenty.

TRIPPET,
Judge of the United States District Court,
Southern District of California, Southern Division.

b Received a copy of the within citation this 9th day of August, 1920.

MORRISON, DAME & BROBECK,
PETER F. DUNNE,
HERBERT W. CLARK,
READ G. DILWORTH,
JOE. E. WADHAM,
Attorneys for Defendant in Error.

(Endorsed:) No. E–34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Citation on writ of error. Filed Aug. 9, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT AND DEFENDANT. } No. E–34.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the District Court of the United States, Southern District of California, Southern Division, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court of the United States, Southern District of California, Southern Division, before you, or some of you, between the United States of America, plaintiff in error, and The Coronado Beach Company, a corporation, defendant in error, wherein a judgment was rendered against said plaintiff in error, for the sum of five million (5,000,000) dollars, manifest error hath happened, to the great damage of said plaintiff in error, as is said and appears by the complaint and its assignment of errors; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal distinctly and openly, you send the records, proceedings, and papers aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the city of Washington, D. C., together with this writ, so that you have the same at the said place, before the Justices
d aforesaid, on the 17th day of September, 1920, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein to correct those errors which of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 9 day of August, in the year of our Lord one thousand nine hundred and twenty.

[SEAL.] CHAS. N. WILLIAMS,
Clerk of the United States District Court,
Southern District of California, Southern Division.
R. S. ZIMMERMAN, *Deputy.*

Allowed by—
TRIPPET,
Judge of the United States District Court,
Southern District of California, Southern Division.

I hereby certify that a copy of the within writ of error was on the 9th day of August, 1920, lodged in the clerk's office of the said District

Court of the United States for the Southern District of California, Southern Division, for said defendant in error.

[SEAL.] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States for the Southern District of California.
R. S. ZIMMERMAN.

e (Endorsed:) No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Writ of error. Filed Aug. 9, 1920. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk.

1 *Names and addresses of attorneys.*

For plaintiff in error:
A. Mitchell Palmer, Attorney General of the United States, Washington, D. C.
George J. Denis, special assistant to the Attorney General, Los Angeles, California.
J. Robert O'Connor, United States attorney, Los Angeles, California.
For defendant in error:
Morrison, Dunne & Brobeck, Peter F. Dunne, Herbert W. Clark, San Francisco, California.
Read G. Dilworth, James E. Wadham, San Diego, California.

2 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, plaintiff, vs. THE CORONADO BEACH COMPANY, a corporation, claimant and defendant.	Bill of complaint.

To the judges of the District Court of the United States for the Southern District of California:

The United States, by the Attorney General thereof, brings this its bill of complaint against the Coronado Beach Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, residing therein.

And thereupon your orator complains and shows unto the court that the defendant, the Coronado Beach Company, is now and was at all the times in this complaint mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

Your orator further shows and alleges that the plaintiff is the owner of an easement, estate, and interest in and to the tract of land hereinafter described, for use for the defense or security of the Nation, and in connection therewith, as sites for permanent aviation stations for the Army and Navy and for aviation school purposes. That plaintiff is now, and ever since the first day of August, 1917, has been, in the possession, occupancy, and use thereof for the purposes above mentioned, under and by reason of an Executive order of the President of the United States, dated and issued on said first day of August, 1917, pursuant to an act of Con-
3 gress of July 27th, 1917 (c. 42, 40 Stat., 247), which said tract of land is situated in the county of San Diego, State of California, and is known, designated, and described as the whole of North Island, in the harbor of San Diego, California.

III.

Your orator further shows and alleges that the defendant, the Coronado Beach Company, a corporation, claims to have, own, or hold some right, title, estate, or interest in or to or some claim or demand upon said tract of land, or some part thereof, adverse to or in conflict with plaintiff's said easement, estate, and interest therein and thereto; but your orator alleges that said right, title, interest, claim, and demand of said defendant, in or to said tract of land, or any part thereof, if any it has, is subject and subordinate to said easement, estate, and interest of the plaintiff in said land for use for the defense or security of the Nation.

IV.

Your orator further shows and alleges that the public interest and necessity require that the possession and use of said tract of land, as aforesaid, be taken and maintained by plaintiff, permanently, for the purposes hereinbefore set forth, and that this court inquire into, and determine and adjudge any and all interests, estates, claims, or demands of said defendant in or to said tract of land, over and beyond any rights therein or thereto in said plaintiff; and that in the event this court shall find that said defendant has, owns, or holds any right, title, interest, or estate in or to said tract of land over and beyond plaintiff's said easement, estate, and interest therein and thereto, that this court cause such right, title, interest, or estate of said defendant to be appraised, and the value thereof deter-
4 mined and adjudged, and that the same be condemned for public use and for the purposes hereinbefore stated.

V.

Your orator further shows and alleges that the names of all the claimants of the said tract of land, or any part thereof, or of any estate or interest therein or thereto, sought to be determined and adjudged, and if necessary appraised and condemned in this action, so far as known to your orator, are set forth in the title of this complaint.

VI.

Your orator further shows and alleges that the description of said tract of land set forth in paragraph II hereof includes the whole of an entire parcel or tract of real property.

Wherefore your orator having no plain, speedy, or adequate remedy at law, prays that the said defendant, the Coronado Beach Company, a corporation, be required by answer to set forth the nature and extent of its claim, estate, and interest in or to the said tract of land, or any part thereof, over and beyond any rights therein or thereto in plaintiff; and that such claim, estate, or interest of said defendant, if any it has, be determined and adjudged to be subject and subordinate to plaintiff's said easement, estate, and interest therein and thereto; and that the defendant be enjoined from claiming or asserting any right, title, interest, or estate in or to said tract of land adverse to or in conflict with plaintiff's said easement, estate, and interest therein and thereto.

Your orator prays that in the event the court shall find that said defendant has, owns, or holds any right, title, interest, or estate in or to, or claim or demand upon said tract of land, or any part thereof, over and beyond any rights therein or thereto in plaintiff, that the court shall cause such right, title, interest, and estate of defendant, and the whole thereof, to be appraised, and the value thereof determined and adjudged; and that upon payment to said defendant, or into court for it, of the value of the same, as so determined, together with interest thereon at the rate of six per centum per annum from the date the possession of said tract of land was taken by plaintiff as herein alleged, that the court will make and enter a proper decree condemning any and all such estate or interest of defendant in or to said tract of land, for public use for the defense or security of the Nation, and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes, and vesting title in fee simple to said land in the United States.

Your orator prays that a writ of subpoena be issued out of and under the seal of this honorable court, directed to the Coronado Beach Company, a corporation, commanding it, on a certain day, and under a certain penalty to be inserted, to be and appear before this honorable court, and then and there to answer the premises, and to abide such further order and decree as may be agreeable to justice.

Your orator waives answer under oath.

Your orator prays for such other and further relief as to the court may seem equitable and for costs of this suit.

And your orator will ever pray.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff.

6 (Endorsed:) No. E–34, Eq. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, a corporation, claimant and defendant. Bill of complaint. Condemnation proceedings for aviation stations. Filed Aug. 7, 1919. Chas. N. Williams, clerk, by Maury Curtis, deputy clerk.

7 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT and defendant.	No. E–34. In Equity.

Answer of Coronado Beach Company.

Now comes the defendant, Coronado Beach Company, and for answer to the complaint herein admits, denies, and alleges as follows:

I.

Answering the allegations of paragraph I of the complaint herein, defendant admits that it now is and at all times in the complaint mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

Answering the allegations of paragraph II of the complaint herein, defendant denies that plaintiff is the owner of an easement, estate, and interest in and to, or of an easement, estate, or interest in or to the tract of land described in the complaint herein for use for the defense or security of the Nation, or for any purpose or at all, and in connection therewith, or in connection therewith, as sites for permanent aviation stations for the Army and Navy and for aviation school pur-

poses, or for permanent aviation stations for the Army or Navy, or for aviation school purposes, or for any purpose or at all.

8 Admits that plaintiff is now, and ever since the first day of August, 1917, has been in the possession, occupancy, and use of the tract of land described in the complaint, for the purposes alleged in the said complaint, under and by reason of an Executive order of the President of the United States, dated and issued on the said first day of August, 1917, pursuant to an act of Congress approved July 27, 1917.

Admits that said tract of land is situated in the county of San Diego, State of California, and is known, designated, and described as the whole of North Island, in the harbor of San Diego, California.

III.

Answering the allegations of paragraph III of the said complaint, defendant admits that it claims to have, own, and hold some right, title, estate, and interest in and to, and some claim and demand upon said tract of land and all thereof, adverse to and in conflict with the alleged easement, estate, and interest of plaintiff therein or thereto. And in this behalf, defendant alleges that at all the times in the complaint mentioned it has been and now is the sole and exclusive owner in fee simple absolute, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description of plaintiff, in or to the same, or any part or parcel thereof, for any purpose whatsoever, of all and singular the tract of land and premises mentioned and described in the complaint herein, and situated in the county of San Diego, State of California, and known, designated, and described as the whole of North Island, in the harbor of San Diego, California. And defendant denies that its said right, title, interest, claim, and demand in or to said tract of land or that its right, title, interest, claim, or demand in or to said tract of land, or any

9 part thereof, is subject and subordinate, or subject or subordinate, to said alleged easement, estate, and interest, or to said alleged easement, estate, or interest, of plaintiff in said land for the defense or security of the Nation, or for any purpose or at all.

IV.

Answering the allegations of paragraph IV of the said complaint, defendant denies that the public interest and necessity or the public interest or necessity require or requires that the possession and use, or possession or use, of said tract of land, or any thereof, be taken and maintained, or taken or maintained, by plaintiff permanently, or at all, for the or any purposes set forth in the complaint herein.

V.

And further answering the complaint of plaintiff, defendant alleges that the value of the property, land and premises sought to be

condemned by plaintiff amounts to the sum of seven million five hundred thousand dollars ($7,500,000.00), and that in the event said property, land and premises, described in the complaint herein, sought to be condemned in this action, are condemned as prayed herein, this defendant will be damaged in the sum of seven million five hundred thousand dollars ($7,500,000).

Second defense.

And for another and second defense, to the bill of complaint herein, defendant alleges:

I.

That on the 20th day of April, 1852, and under and pursuant to the terms and provisions of an act of the Congress of the United States, approved March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and of acts amendatory thereof, Frederick Billings, James R. Bolton, and Henry W. Halleck filed their petition with the board of commissioners on private land claims in California, wherein and whereby they presented to the said commissioners for confirmation their claim to that certain tract of land and real estate in the county of San Diego and State of California known and described as follows, to wit:

The island or peninsula of San Diego, situated in said county of San Diego, and bounded on the north by the estero of the port of San Diego, towards the town; on the east by the end of the ranch of San Augustin Melijo; on the south by the sea; and on the west by the anchorage for ships.

That thereafter such proceedings were had by and before said board of commissioners concerning said claim, which said claim was numbered 188 on the docket of said board; that on October 31st, 1854, said board of commissioners by decree rendered, rejected and refused to confirm said claim.

II.

That within six (6) months after the said decision by said board of commissioners on the said claim No. 188, and under and by virtue of the terms and provisions of the said act of Congress approved March 3, 1851, and of the acts amendatory thereof, the said Frederick Billings, James R. Bolton, and Henry W. Halleck filed with the clerk of the District Court of the United States for the Southern District of California, that being the District Court of the district in which the land described in this second defense was situated, notice of their intention to prosecute an appeal from the decision of said board of commissioners on said claim No. 188.

III.

That on September 22, 1855, and under and by virtue of the terms and provisions of the said act of Congress and of the acts
11 amendatory thereof, the said Frederick Billings, James R. Bolton, and Henry W. Halleck presented to and filed in the District Court of the United States for the Southern District of California, that being the District Court of the district in which the land described in this second defense was situated, their petition setting forth fully the nature of their claim to the lands hereinabove in this second defense described, and the names of the original and then claimants thereto, and containing a deraignment of the title of the said claimants to said land, together with a transcript of the report of the said board of commissioners and of all the documentary evidence and testimony of the witnesses on which said claim was founded, and prayed the said District Court to review the decision of the said board of commissioners on said claim No. 188 and to decide on the validity thereof.

That the said petition so presented to and filed with the said District Court as aforesaid was filed in cause number 257 on the docket of said court, and that the title of said cause was "Frederick Billings et al., assignees of Bezer Simmons, vs. The United States."

That thereafter and on December 15, 1855, summons in said cause Number 257 issued out of and under the seal of said District Court directed to the United States district attorney for the Southern District of California, and, together with a copy of the said petition, was served on the said United States district attorney at Los Angeles, California, on December 26, 1855, as is shown by the return of the United States marshal thereon. That said summons and return were filed and now remain on file in said cause Number 257 and are hereby referred to.

That on January 4, 1856, the said United States district attorney for the Southern District of California filed on behalf
12 of the United States in said cause Number 257 then pending in said District Court an answer to the said petition, denying each and every allegation of the said petition, and denying the validity of the title of the said Frederick Billings, James R. Bolton, and Henry W. Halleck to the land and premises described in the said petition, which said land and premises are the same land and premises hereinabove in this second defense described.

That hereafter, in said cause number 257 on the docket of said District Court, such proceedings were had that the said cause came on regularly for trial and was duly and regularly tried on the merits thereof, and argued by counsel for the respective parties, and thereupon the said court, at the December term thereof, in the year 1856, duly and regularly made and entered its judgment and decree therein ordering, adjudging, and decreeing as follows, to wit:

"This cause coming on to be heard on appeal from the decision of the board of land commissioners to ascertain and settle private land

claims in California, upon the transcript of the proceedings and decision of said board and the papers and evidence upon which said decision was founded, and also upon other evidence taken and filed in this court, and counsel for the respective parties having been heard it is:

"Ordered, adjudged, and decreed that the decision of said board of land commissioners rejecting the claims of the appellants, Frederick Billings and others, be, and the same is hereby, reversed.

"And it is further ordered, adjudged, and decreed that the title of the appellants, Frederick Billings and others, to the land claimed by them, as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.

"The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the "Island or Peninsula of San Diego," is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the ranch of San Augustin Melijo, south by the sea, and west by the anchorage for ships, according to the documents of title and map to which reference is had; if the quantity within said boundaries is less than two square
13 leagues, then the confirmation hereby made is for the whole tract, but if the quantity within said boundaries exceeds two square leagues, then the confirmation hereby made is made for two square leagues and no more."

That the said judgment and decree so made as aforesaid was filed in said cause number 257 on January 12, 1857, and entered at page 130 of judgments and decrees of the United States District Court for the Southern District of California in the volume thereof containing the judgments and decrees of said court for the period beginning September 10, 1853, and ending December 9, 1865, to which record reference is hereby made.

IV.

That after the rendition and entry of the judgment and decree aforesaid by the said district court, the United States appealed from said judgment and decree to the Supreme Court of the United States, and in that court such proceedings were had that at the December term thereof in the year 1863 it was ordered, adjudged, and decreed by said Supreme Court that the said appeal be, and the same was then, dismissed; and thereupon a mandate in the usual form was issued out of and under the seal of the said Supreme Court, directed to the judge of the District Court of the United States for the Southern District of California, directing and commanding that in the said cause No. 257 on the docket of the said District Court for the Southern District of California, such further proceedings should be had as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

V.

That at the regular April term of the United States District
14 Court for the District of California, in the year 1867, the said mandate of the Supreme Court of the United States was presented to said United States District Court for the District of California and filed in said cause No. 257, and it was thereupon ordered, adjudged, and decreed by the United States district court that the appeal theretofore sued out and allowed by the United States from the decree of confirmation rendered in the said cause No. 257 by the late United States District Court for the Southern District of California be, and the same was then, dismissed, and that the said Frederick Billings, James R. Bolton, and Henry W. Halleck be, and they were thereby, allowed to proceed under said decree of confirmation as under a final decree. That the said order, so made as aforesaid, was filed in said cause No. 257 in the United States District Court for the District of California and now remains on file therein; and that the said mandate also now remains on file in said cause in said court.

VI.

That at a stated term of the United States District Court for the District of California, held at San Francisco on the 7th day of May, 1867, such proceedings were duly and regularly had by said court in the said cause No. 257; that the said court duly and regularly ordered that Archibald C. Peachy and William H. Aspinwall be substituted in the places and lieu of Frederick Billings, James R. Bolton, and Henry W. Halleck, and the said cause was ordered revived in the names of said Archibald C. Peachy and William H. Aspinwall as claimants and confirmees therein, and all other proceedings therein were ordered to be had in their names. That the said order, so made as aforesaid, was filed in said cause on May 7, 1867, and now remains on file therein.

15 VII.

That the land, real estate, and premises described in plaintiff's complaint herein are, and at all times have been, a part of, and within the exterior boundaries of, the land, real estate, and premises described hereinabove in this second defense; that heretofore, by divers mesne conveyances made. executed, and delivered to it and to its predecessors in interest and title, the defendant herein became and now is the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises hereinabove in this second defense described; that the cause of action sued upon in said cause No. 257, and the issues adjudicated and determined therein as aforesaid, were and are identical with the cause of action sued upon in and the issues now sought to be raised by the complaint of plaintiff herein; that the decree of confirmation, so as aforesaid rendered and

entered by the United States District Court for the Southern District of California, in said cause No. 257, was, is, and remains a final decree upon the merits of said cause and between the parties thereto and their privies; and that the said court had full power, authority, and jurisdiction over the said parties and the subject matter of said cause. And that the decree of said district court, confirming the title to the said island or peninsula of San Diego, is and constitutes a bar to so much of the present action of plaintiff as seeks to ascertain or determine in plaintiff an easement, estate, or interest therein or thereto for any purpose whatsoever, and the issues tendered by the complaint herein as to such matters are res adjudicata as between the parties hereto.

VIII.

16 That under and by virtue of the terms and provisions of an act of the Congress of the United States approved July 27, 1866, entitled "An act in relation to the District Courts of the United States in the States of California and Louisiana" (14 Statutes at Large, page 300), said United States District Court for the District of California was vested with the power and jurisdiction theretofore had and exercised by the said District Court for the Southern District of California, and had full power, jurisdiction, and authority to proceed as aforesaid in said cause, No. 257, and to make and enter the said orders and decrees therein.

Third defense.

And for another and further defense to the bill of complaint herein, defendant alleges:

I.

That on the 11th day of June, 1869, the plaintiff herein made, executed, and delivered to Archibald C. Peachy and William H. Aspinwall its certain instrument in writing, commonly called a patent, wherein and whereby it gave and granted unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever, all and singular the following described land and premises situate, lying, and being in the County of San Diego and State of California, and described as follows, to wit:

Lot No. forty (40) in township seventeen (17) south of range three (3) west; lot No. thirty-seven (37) in township eighteen (18) south of range three (3) west; and lot No. thirty-eight (38) in township eighteen (18) south of range two (2) west, of the San Bernardino meridian, containing four thousand one hundred and eighty-five and forty-six one-hundredths (4,185.46) acres.

That the said patent, so made, executed and delivered as aforesaid, was and is recorded in volume 7 at pages 246 to 249, inclusive, in the record of patents in the General Land Office of plain-
17 tiff, and was filed for record in the office of the recorder of the

county of San Diego, in the State of California, on July 6th, 1869, and was recorded in book 1 of patents therein, at pages 55 and following, reference to which records, for a more complete description of the said land and patent is hereby made.

II.

That the land, real estate, and premises described in plaintiff's complaint herein are, and at all times have been, a part of, and within the exterior boundaries of, the land, real estate, and premises described hereinabove in this third defense; and that heretofore and since the issuance, delivery, and recording of the said patent, by divers mesne conveyances made, executed, and delivered to it and to its predecessors in interest and title, the defendant herein became and now is the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises described in plaintiff's complaint.

Fourth defense.

And for another and further defense to the bill of complaint herein, defendant alleges:

I.

That on the 11th day of June, 1869, the plaintiff herein made, executed, and delivered to Archibald C. Peachy and William H. Aspinwall its certain instrument in writing, commonly called a patent, wherein and whereby it gave and granted unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever, all and singular the following described land and premises situate, lying, and being in the county of San Diego, and State of California, and described as follows, to wit:

17½ Lot No. forty (40) in township seventeen (17) south of range three (3) west; lot No. thirty-seven (37) in township eighteen (18) south of range three (3) west; and lot No. thirty-eight (38) in township eighteen (18) south of range two (2) west, of the San Bernardino meridian, containing four thousand one hundred and eighty-five and forty-six one-hundredths (4,185.46) acres.

That the said patent, so made, executed, and delivered as aforesaid, was and is recorded in volume 7 at pages 246 to 249, inclusive, in the record of patents in the General Land Office of plaintiff, and was filed for record in the office of the recorder of the county of San Diego, in the State of California, on July 6th, 1869, and was recorded in book 1 of patents therein at pages 55 and following, reference to which records, for a more complete description of the said land and patent, is hereby made.

II.

That the land, real estate, and premises described in plaintiff's complaint herein are and at all times have been a part of and within the exterior boundaries of the land, real estate, and premises de-

scribed hereinabove in this fourth defense; that heretofore and since the issuance, delivery, and recording of the said patent, by divers mesne conveyances made, executed, and delivered to it and to its predecessors in interest and in title, the defendant herein became the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises described hereinabove in this fourth defense, and now is the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises described in plaintiff's complaint.

III.

That the plaintiff herein ought not to have or maintain against this defendant the cause of action attempted to be set out in the
18 complaint herein for the determination of its alleged easement, estate, and interest in and to the tract of land described in the said complaint, because the said supposed cause of action, if any there be, accrued more than five (5) years next preceding the 4th day of March, 1896, and the patent hereinabove in this defense mentioned and described, issued prior to March 3, 1891, to wit, on June 11, 1869, and the said claim is barred by the provisions of the act of Congress approved March 3, 1891, appearing in 29 United States Statutes at Large, at page 1099, and acts amendatory thereof.

Wherefore this defendant prays that it may be adjudged and decreed to be the sole and exclusive owner, in fee simple absolute, of the land, real estate, and premises described in plaintiff's complaint, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character *of* description, of plaintiff in or to the same, or any part or parcel thereof, whether for use for the defense or security of the Nation, or for any purpose whatsoever; that the property in the complaint herein sought to be condemned be not condemned, and that the condemnation thereof be denied; that if said condemnation be had, that the damages to this defendant, and the value of the said land be fixed and assessed at seven million five hundred thousand dollars ($7,500,000.00); that judgment in favor of this defendant and against plaintiff, if said land be condemned, be rendered for the sum of seven million five hundred thousand dollars ($7,500,000.00); for its costs in this behalf expended, and for such other and further relief as to the court may seem meet, equitable, and proper in these premises.

MORRISON, DUNNE & BROBECK,
PETER F. DUNNE,
HERBERT W. CLARK,
Solicitors and Attorneys for Defendant Coronado Beach Company.

19 (Endorsed:) In equity. No. E-34. United States District Court, Southern Division, Southern District of California. United States of America, plaintiff, *vs.* Coronado Beach Company, a

corporation, claimant and defendant. Answer of Coronado Beach Company. Filed Oct. 25, 1919. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk. Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., attorneys for claimant and deft.

20 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT AND defendant.	No. E–34. In equity.

Reply to answer of defendant.

Now comes the plaintiff, United States of America, and for reply to the counter-claims set forth in the answer of the defendant herein, denies and alleges as follows:

I.

Plaintiff denies that defendant at all or any of the times in the complaint mentioned, or at any other time or times, has been or now is the sole or exclusive owner in fee simple absolute, free or clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description, of plaintiff, in or to the tract of land mentioned and described in the complaint, or any part thereof; but alleges that the land described in the complaint was granted to one Pedro Carrillo by the then governor of California, Pio Pico, on May 15th, 1846, and that said grant was so made by said governor pursuant to, under the conditions of, and subject to the provisions of, the act of the Mexican Congress of August 18th, 1824, and the rules and regulations of said Congress of November 21st, 1828, and particularly under the provisions of article 5 of said act of August 18th, 1824, and article 8 of said act of November 21st, 1828.

21 II.

Plaintiff denies that the value of the property, land, and premises sought to be condemned by plaintiff amounts to the sum of $7,500,000.00, or to any other sum of money in excess of $———; and denies that in the event said property, land, and premises described in the complaint herein sought to be condemned in this action are condemned as prayed herein said defendant will be damaged in the sum of $7,500,000.00, or in any other sum of money in excess of said sum of $———.

III.

Plaintiff denies that the cause of action referred to in Paragraph VII of the second defense set forth in said answer, and sued upon in cause No. 257 on the docket of the United States District Court for the Southern District of California, or the issues adjudicated or determined therein, were or are identical with the cause of action sued upon in, or the issues now sought to be raised, or now raised, by the complaint of plaintiff herein. And plaintiff denies that the final decree of confirmation rendered and entered by the said United States District Court in said cause No. 257 was, is, or remains a final or other decree upon the merits of said cause, or between the parties thereto or their privies; or that the said court had full power, authority, or jurisdiction over the said parties or the subject matter of said cause, if thereby defendant intends to allege that the court in said Paragraph VII, referred to, had the power, authority, or jurisdiction to enter a decree in said action confirming to the petitioners therein a fee simple title absolute, or any other or further title than that granted to the predecessor in interest of said defendant, to wit, the said grantee under the said Mexican grant of May 15th, 1846; and plaintiff further denies that the decree of said
22 United States District Court in said cause No. 257, confirming the title to the said island or peninsula of San Diego, is or constitutes a bar to so much of the present action of plaintiff as seeks to ascertain or determine in plaintiff an easement, estate, or interest therein or thereto, or to any part of plaintiff's cause of action herein; and denies that the issues tendered by the complaint herein as to such or any matters are res adjudicata as between the parties hereto.

IV.

Plaintiff denies that on the 11th day of June, 1869, or at any other time, the plaintiff made, executed, or delivered to Archibald C. Peachy or William H. Aspinwall its certain, or any, instrument in writing wherein or whereby it gave or granted unto the said Archibald C. Peachy or William H. Aspinwall, or to their heirs or assigns, any greater interest, right, title, or estate in or to the land described in paragraph I of the third defense set forth in said answer than the interest, right, title, and estate therein adjudged and confirmed in and by the decree of confirmation so entered in said cause No. 257, in said United States district court; which said right, title, interest, and estate plaintiff alleges was at all times, and now is, subject and subordinate to the easement and estate of plaintiff therein. And plaintiff denies that since the issuance of the said patent, or at any time, by divers, or any, mesne conveyances made, executed, or delivered to it, or to its predecessors in interest or title, the defendant herein became or now is the sole or exclusive owner in fee simple absolute of all or singular the land, real estate, or premises described in plaintiff's complaint.

V.

23 Plaintiff denies that the said claim and cause of action set forth in the complaint herein, or any part thereof, is barred by the provisions of the act of Congress approved March 3, 1891, appearing in 29 United States Statutes at Large, at page 1099, or by any acts amendatory thereof, or at all.

Wherefore plaintiff prays for judgment according to the prayer set forth in its bill of complaint herein.

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California.
Attorneys for Plaintiff.

24 (Endorsed:) In equity. No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Coronado Beach Company, a corporation, claimant and defendant. Reply to answer of defendant. Filed Oct. 30, 1919. Chas. N. Williams, clerk; by R. S. Zimmerman, deputy clerk. Geo. J. Denis, 832 Van Nuys Building, Los Angeles, Cal., attorney for plaintiff.

25 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CORONADO BEACH COMPANY, A CORPORATION, defendant.
} No. E-34, Eq.

Judgment.

The above-entitled cause came regularly on for trial before the above-entitled court, A Mitchell Palmer, Esq., George J. Denis, Esq., and J. Robert O'Connor, Esq., appearing as attorneys for plaintiff, and Morrison, Dunne & Brobeck, Peter F. Dunne, Esq., Herbert W Clark, Esq., R. G. Dilworth, Esq., and Jas. E. Wadham, Esq., appearing as attorneys for the defendant. Thereupon a jury of twelve persons was duly selected, empaneled, and sworn to try said cause. It was agreed in open court by oral stipulation of counsel of the respective parties hereto, which said stipulation was noted in the minutes of this court, that for the purpose of assessing compensation the right thereof shall be deemed to have accrued on the 1st day of August, 1917, and that the actual value at that date of the
26 property hereinafter described shall be the measure of compensation for said property. Thereupon evidence, oral and docu-

mentary, was adduced by plaintiff and defendant. After hearing the evidence, the arguments of counsel, and the instructions of the court, the said cause was submitted to the jury. The jury thereupon rendered its verdict and returned its answers to the special interrogatories directed by the court, as follows:

In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CORONADO BEACH COMPANY, A CORPORATION, defendant.

Verdict.

We, the jury in the above-entitled cause, find that the fair market value of the whole of North Island, as of August 1st, 1917, was $5,000,000 (five million dollars).

Dated April 21, 1920.

MELVILLE KLAUBER,
Foreman.

27 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CORONADO BEACH COMPANY, A CORPORATION, defendant. No. E-84.

Special interrogatories directed by the court.

No. 1. What was the fair market value on August 1, 1917, of the land lying above high-water mark, containing 1,232.93 acres, more or less, referred to as mesa land?

Answer. $4,625,000.00 (four million six hundred twenty-five thousand).

No. 2. What was the fair market value on August 1, 1917, of the 297.24 acres lying above high-water mark, referred to as meadow, marsh, and beach land?

Answer. $45,000.00 (forty-five thousand).

No. 3. What was the fair market value on August 1, 1917, of the lands lying below high-water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands?

Answer. $330,000.00 (three hundred thirty thousand).

MELVILLE KLAUBER, *Foreman.*

Said verdict and the special interrogatories and the answers
28 thereto were received by the clerk and duly filed and entered by him in the minutes of the court.

Thereafter, it appearing to the court that plaintiff was at the time of trial, and since the 1st day of August, 1917, had been, in possession of the land, real estate, and premises hereinafter described for the purposes mentioned in the complaint in this cause, on motion of defendant, the court rendered the following judgment:

Now, therefore, in consideration of the foregoing premises and the law, it is hereby considered, ordered, and adjudged as follows:

I.

That the defendant, Coronado Beach Company, a corporation, was, at the time of the commencement of this action, ever since has been, and now is the sole and exclusive owner in fee simple of all and singular the tract of land hereinafter described, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description of plaintiff, the United States of America, in or to the same, or in or to any part or parcel thereof, for use for the defense or security of the Nation, or for any purpose whatsoever.

II.

That the plaintiff, United States of America, has no easement, estate, interest, right, title, claim, or demand of any kind, character, or description in or to the tract of land hereinafter described, or in or to any part or parcel thereof for use for the defense or
29 security of the Nation, or for any purpose whatsoever, or at all.

III.

That the public interest and necessity require that the possession and use of the tract of land hereinafter described, and the whole thereof, be taken and maintained by plaintiff, permanently, and that the said tract of land, and the whole thereof, be condemned by plaintiff for use for national defense and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation-school purposes.

IV.

That the said use to which the said tract of land is to be applied is a use authorized by law, and the taking thereof is necessary to such use.

V.

That the area of the tract of land herein sought to be condemned was on August 1, 1917, and now is two thousand one hundred three and forty-seven hundredths (2,103.47) acres.

VI.

That of the total number of acres embraced within the tract of land herein sought to be condemned, one thousand two hundred thirty-two and ninety-three hundredths (1,232.93) acres, more
30 or less, were on August 1, 1917, and now are, mesa land, lying above high-water mark; two hundred seven and twenty-four hundredths (207.24) acres were on August 1, 1917, and now are, meadow, marsh, and beach land, lying above high-water mark; and six hundred sixty-three and three-tenths (663.3) acres, more or less, were on August 1, 1917, and now are, tide or submerged lands, lying below high-water mark.

VII.

That the fair market value of the tract of land herein condemned, and of the whole thereof, on the 1st day of August, 1917, was five million (5,000,000) dollars.

VIII.

That the fair market value on August 1, 1917, of the said mesa land, lying above high-water mark, consisting of one thousand two hundred thirty-two and ninety-three hundredths (1,232.93) acres, more or less, was four million six hundred twenty-five thousand (4,625,000) dollars.

IX.

That the fair market value on August 1, 1917, of the said meadow, marsh, and beach land, lying above high-water mark, consisting of two hundred seven and twenty-four hundredths (207.24) acres, was forty-five thousand (45,000) dollars.

31 X.

That the fair market value on August 1, 1917, of the said tide or submerged lands lying below high-water mark, consisting of six hundred sixty-three and three-tenths (663.3) acres, more or less, was three hundred thirty thousand (330,000) dollars.

XI.

That the plaintiff, within thirty days after the entry of this judgment, shall pay the defendant, Coronado Beach Company, a corporation, or into court for it, the sum of five million (5,000,000) dollars, that being the amount of the fair market value of the property sought to be condemned herein by plaintiff for the uses and purposes aforesaid.

XII.

That upon paying the sum of five million (5,000,000) dollars, hereinabove directed to be paid, the plaintiff, United States of America, will be entitled to a final order of condemnation, particularly describing the property condemned, and stating the purposes of such condemnation, which purposes are hereinbefore set forth.

XIII.

That upon the making, entering, and recording of said final order of condemnation, the plaintiff herein shall have full right and
32 liberty of using the tract of land hereinafter described, and the whole thereof, for national defense, and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes.

XIV.

That the tract of land herein sought to be condemned is situate in the harbor of San Diego, in the county of San Diego and State of California, and is known, designated, and described as the whole of North Island, in the harbor of San Diego, California, excepting therefrom those certain pieces or parcels of land within the exterior limits of the said North Island which are described in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded September 12, 1901, in book No. 312 of deeds at page 185, et seq., of the records of said county of San Diego, California, containing thirty-eight and fifty-six hundredths (38.56) acres, more or less, and in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded in book No. 211 of deeds at page 381, et seq., of the records of said county of San Diego, California, containing eighteen and eighty-five hundredths (18.85) acres, more or less.

Done in open court this 1 day of June, 1920.

TRIPPET, *Judge.*

Approved as to form.

GEO. J. DENIS,
Special Assistant to the Attorney General.

Judgment entered and recorded June 1, 1920.

CHAS. N. WILLIAMS,
Clerk U. S. District Court,
Southern District of California.

33 (Endorsed:) E–34 Eq. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* Coronado Beach Company, a corporation, defendant. Judgment. Filed June 1, 1920. Chas. N. Williams, clerk. Morrison, Dunne & Brobeck, attorneys at law, Crocker Building, San Francisco.

34 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT and defendant. } No. E-34.

Notice of intention to move for new trial.

To the above-named defendant and to Messrs. Morrison, Dunne & Brobeck, Peter F. Dunne, Esq., Herbert W. Clark, Esq., R. G. Dilworth, Esq., and James E. Wadham, Esq., its attorneys:

You and each of you will please take notice that the plaintiff herein, United States of America, intends to move the court to set aside the verdict of the jury and judgment in the above-entitled action, given, rendered, and entered herein on the 21st day of April, 1920, and for a new trial in said action, on the following grounds, to wit:

1. Irregularities in the proceedings of the court, by which the plaintiff was prevented from having a fair trial.

2. Irregularities in the proceedings of the jury, by which the plaintiff was prevented from having a fair trial.

3. Irregularities of, and on behalf of the defendant, by which the plaintiff was prevented from having a fair trial.

4. Misconduct on the part of the jury, by which the plaintiff was prevented from having a fair trial.

5. Excessive award and damages appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict of the jury or judgment.

7. That the verdict of the jury is against law.

8. That the judgment entered thereon is against law.

35 9. Errors in law occurring at the trial and excepted to by the plaintiff.

Said motion will be made and based upon the pleadings, files, records, and exhibits in said cause; and upon the minutes of the court, and upon affidavits to be filed.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff.

Points and authorities:

Act of Congress July 29, 1917 (c. 42, Stat., 247).
Garton *v.* Stern, 121 Cal., 347.
Harper *v.* Hildreth, 99 Cal., 265.
Union Collection Co. *v.* Oliver, 162 Cal., 755.
Condee *v.* Gyer, 126 Cal., 546.
Churchill *v.* Flournoy, 127 Cal., 355.
Sections 656 to 660, inclusive, Code of Civil Procedure of the State of California.

36 (Endorsed:) No. E–34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Notice of intention to move for new trial. Filed Apr. 30, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

37 At a stated term, to wit, the January, A. D. 1920 term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles, on Tuesday, the 1st day of June, in the year of our Lord one thousand nine hundred and twenty.

Present: The Honorable Oscar A. Trippet, district judge.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CORONADO BEACH COMPANY, DEFENDANT.	No. E–34. Equity, S. D.

This cause coming on at this time for hearing on (1) on motion to rescind, vacate, and set aside decree; and (2) for motion for new trial; Geo. J. Denis, Esq., special assistant to the Attorney General; and Gordon Lawson, Esq., assistant U. S. attorney, appearing as counsel for the plaintiff; and Herbert W. Clark, Esq., appearing as counsel for the defendant; and W. C. Wren appearing as shorthand reporter of the proceedings and testimony; and a judgment having been signed by the court in open court, and directed to be filed herein; and recorded in judgment book No. 2 for the Southern Division, at pages 565 to 572, both inclusive; and Geo. J. Denis, Esq., special assistant to the Attorney General, having presented the argument in support of motions to rescind, vacate, and set aside decree, and of motion for new trial, and

Now, at the hour of 11.28 o'clock a. m. the court having taken a recess; and

Now, at the hour of 11.36 o'clock a. m. the court having reconvened, and counsel for respective parties being present as before; and W. C. Wren, being present as shorthand reporter; and

Geo. J. Denis, Esq., of counsel, as aforesaid, for the plaintiff, having resumed the argument in support of the aforesaid motions, and

38 Now, at the hour of 12.00 o'clock noon, it is ordered that a recess be taken until the hour of 2 o'clock p. m. of this day, and this cause is continued to that time.

Now, at the hour of 2 o'clock p. m. the court having reconvened, and counsel for respective parties being present as before; and W. C. Wren being present as shorthand reporter; and

Geo. J. Denis, Esq., of counsel, as aforesaid, for the plaintiff, having presented further arguments in support of said motions to rescind, vacate, and set aside the decree, and for motion for new trial; and

Herbert W. Clark, Esq., of counsel, as aforesaid, for the defendant, having presented the argument in opposition to said motions, and

Geo. J. Denis, Esq., of counsel, as aforesaid for the plaintiff, having replied thereto; and

The court at this time gives its oral opinion, and orders that said motions to rescind, vacate, and set aside the decree, and motion for new trial be, and they hereby are, denied.

39 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant. } No. E–34.

Proposed bill of exceptions.

Be it remembered, that this action came on regularly for trial on April 15, 1920, in the above-entitled court, Hon. Oscar A. Trippet, judge presiding; plaintiff appearing by its counsel, A. Mitchell Palmer, Attorney General of the United States; Geo. J. Denis, Esq., special assistant to the Attorney General; and Robert O'Connor, United States attorney for Southern District of California; and defendant appearing by its counsel, Messrs. Morrison, Dunne & Brobeck, Peter F. Dunne, Esq., Herbert W. Clark, Esq., R. G. Dilworth, Esq., and James E. Wadham, Esq.

Whereupon a jury was duly impaneled and sworn to try said cause, and the following proceedings were had:

It was stipulated that the verdict of the jury in this case should be a unanimous verdict.

Mr. DENIS. Now, the preliminary question, I think, your honor, ought to be definitely settled between us as to the area—the acreage of the upland, or so-called tideland, and of the submerged lands—because if we can not agree upon that it will be necessary for us to send to Los Angeles for the district engineer with the maps of the survey to establish these facts.

I need not call your honor's attention to the fact that at no time since January 5th, when the matter was discussed in your honor's chambers, has this question of area been suggested, not even in
40 the trial briefs submitted to us by counsel for the defendant day before yesterday morning; and it comes, I frankly say,

with complete surprise to the Government that we are to try the question of the value of lands that the Government is not seeking to condemn. In other words, concretely put, the Government is seeking to condemn North Island as it occupied it on August 1, 1917, under the Executive order of the President.

Mr. DUNNE. Mr. Denis, I think that we can get that exact acreage for you some time this afternoon.

Mr. DENIS. I would like very much to have it now, because every minute's delay means my being compelled to ask the court for time to bring down Major Downey, of the War Department, with the maps. I am sure that we can agree if it is humanly possible, but I suggest that it is possible that we may not agree.

Plaintiff offered in evidence the petition of Pedro Carrillo to the governor of California; the reports on the Carrillo petition; the grant of land to Carrillo by Pio Pico, governor of California; the petition of Billings and others to the Court of Private Land Claims for confirmation of the grant made by Pio Pico; the judgment of such Court of Private Land Claims; the decree of confirmation by the District Court of the United States upon such petition of Billings and others; the patent of the United States to Peachy and Aspinwall, successors in interest of Pedro Carrillo in the grant above referred to; the notice of appeal to the Supreme Court of the United States of case 257, the case of Billings and others against the United States, the dismissal of such appeal under orders of the United States Attorney General; which said documents so offered read as follows:

41 PLAINTIFF'S EXHIBIT 1.

Pedro C. Carrilio, native of this Department of California, and resident of this port, before you with due respect and in conformity with law, appears and says: That being in want of a proper land for the breeding of cattle, both large and small, and horses, and desirous of encouraging these (kinds of) property, he names a vacant land in the limits of this port, on the southern part, known by the name of "La Isla," or peninsula, which the port of San Diego forms: The which contains a little more or less, two leagues or "siteos," according to the map which he transmits, said land being fit for a cattle farm, for which purpose he asks for it, and is bounded on the north by the "Estero" Creek of same port, east by the place of Don Aguitino Meliso, south by the sea, and west by the bay and ship anchorage; and he prays you that after the informations which you may think proper to take, you will be pleased to grant it to him, passing the expediente to his excellency the governor of the department, that he may have the goodness to order the corresponding title of ownership to be issued to him.

Wherefore I pray and beseech you to be pleased to provide for the manner and form which I have asked, in which I will receive grace

and favor. Swearing not to act from malice and whatever else may be necessary, admitting this on common paper for want of stamped.

San Diego, April 21st, 1846.

(Signed) PEDRO C. CARRILLO.

SAN DIEGO, *April 21', 1846.*

The 2d magistrate of this town will be pleased to inform relative to the petition made by Don Pedro C. Carrillo if the place he
42 petitions for is vacant, or if it belongs to any individual, corporation, and this being complied with, he will return the espediente to this sub-prefecture for the other purpose.

ARGUELLO,

Senor Sub-Prefect of the Portido of San Diego.

PLAINTIFF'S EXHIBIT 2.

SAN DIEGO, *April 21', 1846.*

The place which citizen Pedro C. Carrillo asks for is at present entirely vacant and does not belong to any ownership, and consequently may be granted to him.

(Signed) JUAN MARIA OSUNA.

MOST EXCELLENT SIR: From the information asked with respect to the place of "La Ysla," or peninsula, which citizen Pedro C. Carrillo , it results that it is entirely vacant, so that it being granted would cause no injury to a third person; wherefore if the Superior Authority thinks proper, it can grant it to the petitioner, as he is without any land of his own and combines in his person the requisites of colonization.

San Diego, April 21', 1846.

(Signed) JOSE R. ARGUELLO.

ANGELES, *May 15', 1846.*

Having seen the petition with which this espediente commences, the necessary reports, with all other things which were represented and deemed proper to be seen in conformity with the law of August 18th, 1824, and regulation of November 21', 1828, I declare
43 Don Pedro Carrillo owner in fee of the land known or named "Isla," or peninsula, in the port of San Diego towards the part of —— of the anchorage. Let the corresponding title be issued and reserve the espediente in order to submit it to the approval of the most excellent departmental assembly.

Pio Pico, constitutional governor of California, thus ordered, decree, and signed, I certify.

(Signed) PIO PICO.

(Sgd.) JOSE MATIAS MORINO,

Secretary.

PLAINTIFF'S EXHIBIT 3.

Pio Pico, constitutional governor of the Department of California. [Seal.]

Whereas Don Pedro Carrillo has, for his own personal benefit and that of his family, petitioned for the land known as the island or peninsula in the port of San Diego, the proper examinations being previously made, using the faculties which are conferred on me in the name of the Mexican nation, I have granted him the aforesaid land in decree of this day, declaring to him the ownership of it by these presents, in conformity with the law of August 18, 1824, and the regulations of Nov. 21′, 1828, subject to the approval of the most excellent departmental assembly, and under the following conditions:

1. He may enclose it without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use or cultivation of it as may best suit him.

2d. He shall request the proper magistrate to give him juridical possession in virtue of this order, by whom the boundaries will be marked out.

44 3d. The land of which donation is made is two square leagues, and is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the rancho of San Augustin Melisse, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance.

In consequence I order that the present title being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the party interested for his security and other purposes.

Given in the city of Los Angeles on this common paper for want of stamped, on the 15th day of May, 1846.

(Signed) PIO PICO.
(Signed) JOSE MATIAS MORINO,
Secretary.

Note has been made of this superior order in the proper book.
(Signed) MORINO.

Note has been made of this superior order on (page) 5 over in the proper book in this subprefecture in my charge.
(Signed) JOSE R. ARGUELLO.

Filed in office April 20th, 1852.
GEO. FISHER, *Sec'y.*

I certify the foregoing to be a correct translation.
(Signed) GEO. FISHER, *Sec.*

Filed in office Sept. 22d, 1852.
(Signed) GEO. FISHER, *Sec.*

45 PLAINTIFF'S EXHIBIT 4.

"*To the honorable commissioners to settle private land claims in California:*

The petitioners, Frederick Billings, James R. Bolton, and Henry W. Halleck, assignees of Bezer Simmons, respectfully shows:

That on the 15th day of May, A. D. 1846, Pio Pico, governor of California, by virtue of authority in him vested, granted to Pedro C. Carrillo, the island or peninsula of San Diego, situate in the present county of San Diego, containing 2 square leagues, with the boundaries described in the grant, a copy of which is submitted herewith marked A with a translation marked B.

That on the 20th day of October, 1846, the said Pedro C. Carrillo sold and conveyed the said tract of land to the said Bezer Simmons, a copy of which conveyance is submitted herewith marked C with a translation marked D.

That on the 3d day of September, A. D. 1850, the said Bezer Simmons, by deed of assignment, conveyed the said grant of land to the petitioners, a copy of which deed of assignment is submitted herewith marked E.

And the petitioners further show that the said land has not been surveyed by the Surveyor General of the United States, such survey, from the nature of the case being unnecessary, the boundaries being natural, and not to be mistaken.

That since the year 1846 the said Pedro C. Carrillo, Bezer Simmons, and the petitioners have been and the petitioners are now in the quiet, peaceful, and undisputed possession of the said tract of land.

That they know of no conflicting claim.

That they rely for confirmation of title upon the original papers, copies of which are submitted herewith; upon the records
46 and minutes in the archives now under the charge of the Surveyor General; and upon such other and further proofs as they may be advised as necessary.

Wherefore they pray the commissioners to confirm to them the said tract of land.

By their Attys.:

HALLECK, PEACHY & BILLINGS.

Filed in office April 20th, 1852.

GEO. FISHER, *Secy.*

"D."

TRANSLATION OF CONVEYANCE.

In the town of San Diego, Territory of California, on the twentieth day of the month of October, eighteen hundred and forty-six, before me, Citizen Enrique Domingo Fitch, second alcalde of this town and its jurisdiction, and before the witnesses of my assistance,

with whom I act in virtue of my office, besides the witnesses to the instrument, who will at the end be named, appear Don Pedro Carrillo, neighbor and resident of this town, whom I certify I know, and said: That with the knowledge of his wife and in virtue of a contract entered into with the captain of the North American ship "Magnolia," Don Bezer Simmons, citizen of the United States of the North, his residence in the State of Vermont, on the twentieth of the present month and year, who also was present, in which he sold all the land of his ownership in the island or peninsula which is formed by the harbor of San Diego, until it touches the lands of Santiago Emiadio Arguello, which land contains two square leagues, as shown by the title issued by his excellency the governor of the Department, Don Pio Pico, for the sum of one thousand dollars in cash, the only price at which it has been valued, no person having offered
47 him more, and he not finding any person who would give him more, and if it is worth more he cedes and makes donation of it in favor of the said Don Bezer Simmons of his free and spontaneous will, and that of his said wife, so that the contrary can not be maintained by any law or title, for he renounces all that can favor him and binds and comprises himself from this time for himself and in the name of his heirs and successors and of whoever of them may have title, voice, or claim in any manner from this moment he conveys, transfers, and gives in perpetual alienation, with the right of inheritance forever, to the said Don Bezer Simmons and to his heirs, the right of ownership which he has in the said island or peninsula, delivering the corresponding title, dated the fifteenth day of May, one thousand eight hundred and forty-six, which land he declares has not been sold, alienated, or pledged, and that it is free from all tribute, religious or charitable tax, entail, pledge, or other incumbrance, real, perpetual, special, general, tacit, and expressed, and as such he cedes and transfers and from this time forth forever disposes himself and desists from, takes away, and separates from his heirs and successors the dominion, ownership, title, voice, recourse, and every other right which he has in the said land of the peninsula, and cedes, renounces, and transfers them with the actions, real and personal, mixed, direct, and effective in Senor Bezer Simmons, and in whoever may represent his person, that he may possess, exchange, alienate, and dispose of it at his pleasure as of his own property acquired with legal and just title; he confers on him irrevocable power, with free, full, and general administration, and constitutes him attorney in fact in his own cause, that either of his own authority or judicially he may enter upon and possess himself of the said island or peninsula, and take and seize the real tenure and possession of it which by law belongs to him:
48 and that he may not need to take it, he prays that an authenticated copy of this present be given him, by which, without any other act of taking, it will be seen that he has taken and seized it, and it has been transferred to him, and in the meantime he constitutes himself his tenant and temporary possessor in legal form, and he binds himself that said island or peninsula shall be certain, sure, and

effective, and no person shall molest him or bring suit against his ownership, enjoyment, and benefit; neither shall any incumbrance appear against it, and if he should be molested or suit brought or an incumbrance appear, so soon as the grantor or his heirs and successors may be called upon in conformity with law, they will come forward in the defence in all courts and tribunals until they obtain judgment in his favor, and leave the said Don Bezer Simmons and his in free use, quiet, and peaceful possession; and not being able to obtain it, they shall give him another equal in value, and in want of such he will restore its value, the improvements, useful and necessary, which at the time he may have, the greatest value and estimation which with time they may acquire, and all the costs, expenses, and damages which may follow or accrue to him; all which shall be executed upon them in virtue of this writing, and the oath of him who possess it, or of whoever may represent him, to whom he leaves it to fix the amount, and he relieves him from other proof. And for the observance of all the foregoing the grantor binds his person, his property which he now has or may hereafter obtain, and with it submits himself, and renounces the laws in his favor and defence, with the legal exceptions in form, and he confers ample power in the magistrates who of this matter ought to take cognizance that they force and compel him by the "na ejecutiva" to comply with it, as a definitive sentence passed in authority of res judicata, consented to,
49 and without other recourse, and as such he secures it. And they signed it, with me and those of my assistance, the witnesses to the instrument being citizens Miguel de Pedrosena, Jose F. Snook, Thomas Russell.

(Signed) H. D. FITCH,
(Signed) PEDRO C. CARRILLO.

Asstv. witnesses:
(Signed) SANTIAGO E. ARGUELLO.
(Sgd.) ALFD. ANSELIN.

Witnesses to the Instrument.
(Signed) MIGUEL D. PEDROSENA.
(Sgd.) JOSE F. SNOOK.
(Sgd.) THOMAS RUSSELL.

Filed in office April 20th, 1852.

GEO. FISHER, *Sec'y.*

"E."

DEED OF ASSIGNMENT.

This indenture, made this third day of September, A. D. one thousand eight hundred and fifty, between Bezer Simmons, of San Francisco, in the State of California, party of the first part, and Frederick Billings, James R. Bolton, and H. W. Halleck, of said city, parties of the second part—

Witnesseth, that the said party of the first part, in consideration of the sum of one dollar to him in hand paid by the said parties of

the second part, the receipt whereof is hereby acknowledged, and for the further consideration hereinafter specified, hath given, granted, bargained, and sold, and by these presents do give, grant, bargain, and sell unto them, the said parties of the second part, all those lands, tenements, and hereditaments lying and being in the State of California, which are more particularly specified and described in a schedule hereto annexed and made a part hereof, marked Schedule A. To have and to hold unto them the said parties
50 of the second part, their heirs and assigns forever, in trust nevertheless and to and for the following uses, intents, and purposes, that is to say, that the parties of the second part shall take possession of all and singular the said lands, tenements, and hereditaments hereby conveyed or intended so to be, and sell and dispose of the same either at public or private sale, to such person or persons, for such prices and on such terms and conditions, and either for cash or upon credit, as in his judgment may appear best and most for the interest of the parties concerned, and convert the same into money, and thereupon to execute, acknowledge and deliver good and sufficient deeds, and all instruments of conveyance necessary to effect a sale and transfer of any and all the estates and property hereby conveyed or intended so to be, and by and with the proceeds of such sales, the said parties of the second part shall first pay and disburse all the just, reasonable, and usual expenses, costs, charges, and commissions of making, executing, and carrying into full effect this assignment and the objects thereof, and the residue of the proceeds of such sales shall be considered as the nett avails or proceeds of the property hereby conveyed.

And first, by and with the said nett proceeds, the said parties of the second part shall pay and discharge in full all the debts, obligations, and demands, due or to become due by the party of the first part or in anywise existing against him, together with all interest that may be due thereon at the time of payment.

And, secondly, by and with the rest, residue, and remainder of said nett proceeds, if any shall remain after the payment in full of said debts and private liabilities of the party of the first part, the said party of the second part shall pay and discharge the partner-
51 ship debts mentioned in the deed of assignment this day made by the said Bezer Simmons and William H. Aspinwall to the said parties of the second part, and hereby referred to, according to the order and arrangement established by the said deed for the payment of the debts therein mentioned or referred to. And the said party of the first part also assigns and conveys to the said parties of the second part all the goods, chattels, vessels, boats, and personal property of every kind mentioned in the said Schedule A, hereto annexed, in trust for the uses and purposes herein set forth as those to which the proceeds of the real estate above conveyed are to be devoted.

In testimony whereof the party of the first part doth hereunto set his hand and affixed his seal on the day and year first herein written.

(Sgd.) B. SIMMONS.

Signed, sealed, and delivered in the presence of—

(Sgd.) ARCH. D. PEACHY.
(Sgd.) C. TEMPLE EMMET.

STATE OF CALIFORNIA,
County of San Francisco:

At San Francisco, on this third day of September, A. D. eighteen hundred and fifty, personally appeared before me, a notary public in and for said county, Bezer Simmons, well known to me to be the party described in, and who executed the same freely and voluntarily and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal official the day and year above written.

[SEAL.] (Signed) C. TEMPLE EMMET,
Notary Public.

Filed in office April 20th, 1852.

GEO. FISHER, *Sec'y.*

32 PLAINTIFF'S EXHIBIT 5.

No. 188.

Opinion by Comr. S. B. Farwell.

FREDERICK BILLINGS ET AL. vs. THE UNITED STATES. } Claim for the island or peninsula at Santiago, in the county of Santiago.

In this case the claimants have offered in evidence traced copies of the espediente and grant to Don Pedro Carrillo.

The grant was issued by Pio Pico, governor, and is dated the 12th day of May, 1846.

The claimants have also offered in evidence a deed of conveyance from the said Carrillo and his wife of the premises to Don Bezer Simmons, dated the 20th day of October, 1846.

Also a deed of assignment from the said Simmons to the said Billings and others, the present claimants, bearing date the 2d day of Sept., 1850.

The genuineness of all said documents is satisfactorily established by the proofs in the case.

The grant contains the usual conditions, and it now remains to be seen whether these conditions have been complied with. There is no evidence whatever that the original grantee has ever done anything whatever in the line of improvements or that he or any other person ever inhabited the same up to the day of his sale to said Simmons. But it does appear from the documentary evidence that he sold the

same before he performed any of the conditions of inhabitancy or cultivations in violation of the terms and conditions of the grant. Thomas D. Johns is the only witness in the case produced on the part of the claimants to prove the performance of the conditions of the grant. He testifies that he is acquainted with the premises in question and that he knows that three houses were erected
53 sometime in the summer or fall of 1850, and that they were erected by the agent of William Aspinwall in order to keep possession of the island and keep off squatters.

It is the opinion of the board that the conditions of the grant and the law under which the same was issued have not been complied with and that the claim is invalid and that the same should be rejected, and a decree will be entered accordingly.

Rejected.

Filed in office Oct. 31, 1854.

GEO. FISHER, *Sec'y.*

PLAINTIFF'S EXHIBIT 6.

In the District Court of the United States within and for the Southern District of California.

Hon. Isaac S. K. Ogier, judge. December term, 1856.

THE UNITED STATES, appellee,
vs.
FREDERICK BILLINGS, & OTHERS, appellants. } No. 257.

Transcript from the board of land commissioners, No. 188.

This cause coming on to be heard on appeal from the decision of the board of land commissioners to ascertain and settle private land claims in California, upon the transcript of the proceedings and decision of said board and the papers and evidence upon which said decision was founded, and also upon other evidence taken and filed in this court, and counsel for the respective parties having been heard, it is

Ordered, adjudged, and decreed that the decision of said
54 board of land commissioners, rejecting the claim of the appellants Frederick Billings and others, be, and the same is hereby, reversed.

And it is further ordered, adjudged, and decreed that the title of the appellants, Frederick Billings and others, to the lands claimed by them, as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.

The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the "Island or peninsula of San Diego," is situated in the county of San Diego, and

is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the ranch of Augustin Melijo, south by the sea, and west by the anchorage for ships, according to the documents of title and map to which reference is had; if the quantities within said boundaries is less than two square leagues, then the confirmation hereby made is for the whole tract, but if the quantity within said boundaries exceeds two square leagues, then the confirmation hereby made is for two square leagues and no more.

ISAAC S. K. OGIER,
U. S. Dist. Judge for the So. Dist. of Cal.

(Endorsed:) Filed Jany. 12, 1857, C. Sims, clerk.

55 Pursuant to stipulations of the parties entered into in open court, there was admitted in evidence the order made by the United States District Court for the District of California on May 7, 1867, which said order is in words and figures as follows, to wit:

At a stated term of the United States District Court, held at San Francisco on the 7th day of May, A. D. 1867.

Present: Hon. Ogden Hoffman, judge.

FREDERICK BILLINGS ET AL., assigness of Bezar Simmons, dec'd., claimants and appellants, *vs.* THE UNITED STATES, appellees.	No. Isla de San Diego.

Now, at this day, on motion of counsel for claimants and filing deeds of conveyance in support thereof showing title to the premises known as the island or peninsula of San Diego claimed by and confirmed to the aforesaid claimants and appellees to be in Archibald C. Peachy and William H. Aspinwall, the said Peachy being the owner of the one undivided moiety and the said Aspinwall of the other undivided moiety.

Now, therefore, it is hereby ordered that the said Archibald C. Peachy and William H. Aspinwall be, and they are hereby, substituted in the place and lieu of Frederick Billings et al., assignees of Bezar Simmons herein, and that this cause be, and the same is, revived in the names of said Archibald C. Peachy and William H. Aspinwall as claimants and confirmees herein, and that all further proceedings had herein be in their names.

OGDEN HOFFMAN, *Dist. Judge.*
GEO. C. GORHAM, *Clk.*
By JOHN O. WHEELER, *Dep.*

(Endorsed:) Filed May 7, 1867.

56 Pursuant to stipulation between the parties, there was then admitted in evidence the following:

In the District Court of the United States for the Southern District of California.

Hon. Isaac S. K. Ogier, judge.

FREDERICK BILLINGS ET AL., ASSIGNEES OF BEZAR SIMMONS, appellants,
vs.
THE UNITED STATES, APPELLEE.
No. 257.
Transcript No. 188.

The answer of Pacificus Ord, attorney of the United States for the Southern District of California, for and in behalf of the United States, to the petition of Frederick Billings, James R. Bolton, and Henry W. Halleck, assignees of Bezar Simmons and of Orrin Simmons, Henry Simmons, Nathan R. Simmons, Benjamin F. Simmons, Priscilla Simmons, Ann S. Ryder, and Augusta S. Bartholomew, heirs at law of Bezar Simmons, deceased, for a rehearing of this case; and that the decision of the commissioners appointed under the act of Congress of 3rd March, 1851, to examine claims to land in California, be reversed and annulled, and their claim to the island or peninsula of the port of San Diego be confirmed, says: That he denies all and singular each and every allegation in said petition contained. And further, this respondent denies generally the validity of the alleged title of the claimants to the said land claimed by them. And further, this respondent denies that the said Billings, Bolton & Halleck are the assignees of said alleged heirs at law of said Simmons, deceased.

And the said respondent prays that this honorable court will affirm the decision of said commissioners in said case; and decree the said alleged title for said land to be invalid, and for general relief.

P. ORD,
Attorney of the United States
for the Southern District of California.

(Endorsed:) Filed Jan'y 14th, 1856. C. E. CARR, Clk.

57 It was stipulated by and between the parties plaintiff and defendant:

(1) That the premises described in the complaint herein, to wit, North Island, in the harbor of San Diego, in the county of San Diego, California, are included within and are a part of the land described in that certain decree of confirmation rendered by the United States District Court for the Southern District of the State of California, at the December term thereof, in the year 1856, in a proceeding therein pending entitled Frederick Billings et al., assignees of Bezar Simmons, vs. The United States, numbered 257 on the docket of said court; and that the said premises are included within and are a part of the land described in that certain patent dated June 11, 1869, and issued by the United States of America to Archibald C.

Peachy and William H. Aspinwall, which said patent is described and referred to in the third and fourth defenses interposed by the defendant herein to the complaint of the plaintiff.

(2) That the defendant, Coronado Beach Company, has succeeded to and, with the exception of two small tracts aggregating 57.41 acres, more or less, heretofore conveyed by the defendant to the plaintiff, is now the owner of all and singular the right, title, and interest of the confirmees named and described in the said decree of confirmation in said proceeding number 257 in and to North Island aforesaid, and has succeeded to and is now, with said exception, the owner of all the right, title, and interest of the said patentees, Archibald C. Peachy and William H. Aspinwall, in and to said North Island.

(3) That the defendant, Coronado Beach Company, has paid all taxes levied or assessed upon the premises described in the complaint herein since the issuance of the said patent dated June 11, 1869.

58 PLAINTIFF'S EXHIBIT 7.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that pursuant to the provisions of the act of Congress approved the third day of March, one thousand eight hundred and fifty-one, entitled "An act to ascertain and settle the private land claims in the State of California," Frederick Billings, James R. Bolton, and Henry W. Halleck, as claimants, filed their petition on the 20th day of April, 1852, with the commissioners to ascertain and settle the private land claims in the "State of California, sitting as a board in the city of San Francisco," in which petition they claimed the confirmation of their claim to the tract of land called the island or peninsula of San Diego, containing two square leagues, more or less, in the county of San Diego and State aforesaid, said claim being founded on a Mexican grant to "Pedro Carillo," made on the 15th day of May, 1846, by Pio Pico, then constitutional governor of the "Department of California;" and

Whereas the board of land commissioners aforesaid by a decree rendered October 31st, 1854, rejected said claim, which decree or decision was on appeal reversed by the District Court of the United States for the Southern District of California at its December term, 1856, in the cause entitled "The United States, appellees, *Ads.* Frederick Billings & other appellants," the decision of said court being as follows: "It is 'Ordered, adjudged, and decreed that the decision of said board of land commissioners rejecting the claims of the appellants, Frederick Billings & others, be, and the same is hereby, reversed.

"'And it is further ordered, adjudged, and decreed, that the
59 title of the appellants, Frederick Billings and others, to the

land claimed by them, as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.

"The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the island or peninsula of San Diego, is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego, towards the town, east by the land of San Augustin Melijo, south by the sea, and west by the anchorage for ships according to the documents of title and maps to which reference is had.

"If the quantity within said boundaries is less than two square leagues, then the confirmation hereby made is for the whole tract, but if the quantity within said boundaries exceed two square leagues, then the confirmation hereby made is made for two square leagues and no more, and appeal having been taken from said decree to the Supreme Court of the United States, said appeal was dismissed at the December term, 1863, of said Supreme Court as appears from a duly authenticated transcript on file in the General Land Office whereupon the aforesaid District Court by a decree filed May 7, 1867, ordered that said claimants be and they are hereby allowed to proceed under said decree of confirmation as under a final decree.

"And whereas it further appears from a duly authenticated transcript on file in the General Land Office that at a stated term of the United States District Court held at San Francisco, on the seventh day of May, 1867, A. D., a decree was rendered in this case, substituting Archibald C. Peachy and William H. Aspinwall in place
60 and lieu of Frederick Billings et als., and ordering that this cause be and the same is reversed in the name of said Archibald C. Peachy and William H. Aspinwall as claimants and confirmees herein and that all further proceedings had herein be in their names.

And whereas, under the 13th section of said act of 3d March, 1851, and the supplemental legislation there has been deposited in the General Land Office a return with a plat of the survey of the said claim confirmed as aforesaid authenticated by the signature of the United States Surveyor General of the State of California, whereby it appears that said claim has been designated as lot numbered forty in township seventeen south of range three west, and lot numbered thirty-eight in township eighteen south of range two west of the San Bernardino meridian, containing four thousand one hundred and eighty-five acres and forty-six hundredths of an acre, situated in the State of California, the plat in the aforesaid return of survey being in the words and figures as follows, to wit:

61 Now know ye that the United States of America in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of 3d March, 1851, and the legislation supplemental thereto, have given and granted and by these presents do give and grant unto the said Archibald C. Peachy and William H. Aspinwall, and their heirs, the tract of land embraced and described

in the foregoing survey, but with the stipulation that in virtue of the 15th section of the said act the confirmation of the said claim and this "patent" shall not affect the interest of third persons.

To have and to hold the said tract with the appurtenances unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever with the stipulation aforesaid.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this eleventh day of June, in the year of our Lord one thousand and eight hundred and sixty-nine and of the independence of the United States the ninety-third.

U. S. GRANT.

By the President:
By L. N. BURRITT,
"*Secretary.*"

MARTIN BUELL,
Acting Recorder of the General Land Office.

"Admiterim."

Recorded vol. 7, pages 246 to 249, inclusive.

Received for record July 6th, A. D. 1869, at one o'clock and 30 min. p. m., and recorded July 26th, 1869, at 3 hr. p. m., at the request of E. W. Morse.

G. A. PENDLETON, *County Recorder.*
By ED. HEUCK, *Deputy.*

62 PLAINTIFF'S EXHIBIT 8.

In the District Court of the United States for the Southern District of California.

FREDERICK BILLINGS ET AL., ASSIGNEES OF BEZER SIMMONS,
vs.
THE UNITED STATES. } No. 257.

Appeal by claimant.

To the honorable the judge of the United States District Court for the Southern District of California:

The petition of Frederick Billings, James R. Bolton, and Henry W. Halleck, assignees of Bezer Simmons, and of Orrin Simmons, Henry Simmons, Nathan P. Simmons, Benjamin E. Simmons, Priscilla Simmons, Ann S. Ryder, and Augusta S. Bartholomew, heirs at law of Bezer Simmons, deceased, respectfully represents that under the provisions of the act of Congress of the 3d of March, 1851, a petition was presented to the commissioners appointed under said act

to examine claims to land in California, praying for the confirmation of the said claim of petitioner to the tract of land known as the island or peninsula of the port of San Diego; that said petition was accompanied by evidence of the title of said Bezer Simmons and the other petitioners, to which for more particular information petitioners beg leave to refer; that the said claim was designated as number 188 on the docket of said commissioners, and was rejected by them on the 31st of October, 1854; that the said land is situated in the Southern Judicial District of California; that a transcript of the decision and proceedings of the commissioners was filed in the office of the clerk of the court for that district on the 2nd day
63 of July, 1855; and that a notice of appeal on behalf of the claimants was filed with said clerk on the said 2nd day of July, 1855.

Your petitioners pray for a rehearing of the case upon this appeal; that the said decision of the commissioners may be reversed and annulled, and that the court will make such decree and order as may be necessary and proper to confirm said claim to the premises mentioned and referred to in their said petition and evidence of claim. And your petitioners will ever pray, &c., &c.

HALLECK, PEACHY & BILLINGS
and
STANLEY & KING,
Attys. for Petitioners.

LOS ANGELES, *Sept. 22nd, 1855.*

(Endorsed:) Filed Sept. 22, 1855. C. E. Carr, clerk, by John W. Rose, dep.

PLAINTIFF'S EXHIBIT 9.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the District Court of the United States for the
[SEAL.] *Southern District of California, greeting:*

Whereas lately in the District Court of the United States for the Southern District of California, before you, in a cause between Frederick Billings, James R. Bolton, & Henry W. Halleck, assignees of Bezer Simmons et al., appellants, and the United States appellees (No. 257, for "Island or Peninsula of San Diego"), wherein the decree was rendered in favor of the said appellants, as to the
64 inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears, and whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and on the motion of Mr. Attorney General Bates, of

counsel for the appellants, it is now here ordered, adjudged, and decreed by this court that this cause be, and the same is hereby, dismissed, 12 Feb.

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December in the year of our Lord one thousand eight hundred and sixty-three.

Taxed by D. W. Middleton, clerk of the Supreme Court of the United States.

Cost of ———.

Check $———.

Attorney $———.

(Endorsed:) Filed May 7, 1867. Geo. C. Gorham, clerk, by John O. Wheeler, deputy.

65 The defendant offered in evidence the decree of this court establishing the title in the defendant, to which the plaintiff objected, and upon the objection being overruled an exception was reserved on behalf of the plaintiff. The said decree was thereupon admitted in evidence as defendant's Exhibit A, and reads as follows:

In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CORONADO BEACH COMPANY, A CORPORATION, DEFENDANT.	No. E–34. In Equity.

Decree.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the plaintiff, United States of America, has no easement, estate, interest, right, title, claim or demand of any kind, character, or description in or to the land mentioned and described in the bill of complaint herein, and more particularly described, designated, and set out in the said bill of complaint as the whole of North Island in the harbor of San Diego, in the county of San Diego and State of California, or in or to any part or parcel thereof, for use for the defense or security of the Nation, or for any purpose whatsoever, or at all, except that as to those certain pieces or parcels of land within the exterior limits of the said North Island which are described in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded September 12, 1901, in book No. 312 of deeds, at page 185 et sequitur, of the records of said county of San Diego, California, containing thirty-eight and fifty-six

66 hundredths (38.56) acres, more or less, and in that certain deed

from Coronado Beach Company, a corporation, to the United States of America, recorded in book No. 211 of deeds, at page 381 et sequitur, of the records of said county of San Diego, California, containing eighteen and eighty-five hundredths (18.85) acres, more or less, the United States of America is the owner in fee simple of said certain pieces or parcels;

That the claimant and defendant herein, Coronado Beach Company, a corporation, was, at the time of the commencement of this suit, ever since has been and now is the sole and exclusive owner in fee simple absolute of all and singular the land mention, designated, and described in the bill of complaint herein and more particularly described, designated, and set out in the said bill of complaint as the whole of North Island in the harbor of San Diego, in the county of San Diego, and State of California, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description of plaintiff, the United States of America, in or to the same, or in or to any part or parcel thereof, for use for the defense or security of the Nation, or for any purpose whatsoever, or at all, except as to the aforesaid certain pieces or parcels hereinabove in this decree specified and of which the United States of America is the owner in fee simple;

That the title of claimant and defendant, Coronado Beach Company, a corporation, in and to the land in the said bill of complaint described, and in and to every part and parcel thereof, except as to the aforesaid certain pieces or parcels of land hereinabove in this decree specified, be and the same hereby is quieted and established against any and all claims and demands whatsoever of plaintiffs, the United States of America.

Done at Los Angeles, this 15th day of March, 1920.

OSCAR A. TRIPPET,
Judge.

67 Plaintiff's Exhibit 10 (for identification), map marked "North Island, site No. 1," and being a part of report No. 3 of the commission on navy yards and naval stations; and attached to Document 1946, part 3, Sixty-fourth Congress, second session, House of Representatives.

68 APRIL 16, 1920.

The COURT. I will limit this argument to an hour and a quarter on a side. Proceed.

Mr. DUNNE. (Proceeds with argument upon the question of the boundaries and area of North Island.)

Mr. DENIS. (Replies to argument of Mr. Dunne.)

The COURT. What do you claim, then, is your right beyond high-water mark, out to this survey, the edge of the anchorage—what is your claim?

Mr. DUNNE. Our claim is that we have the right to build wharves and other structures in utilization of our tide lands.

The COURT. Without a franchise?

Mr. DUNNE. Absolutely. We are the private owners.

* * * * * * *

Mr. DENIS. The point I make is that Congress intended to take that land and no submerged lands whatever.

The COURT. I am inclined to think, Colonel Denis, that you ought to amend your complaint and say so.

Mr. DENIS. I am perfectly willing to amend the complaint, your Honor, but I would rather have some short time after the court has held that the point made by the Government—that the lands included in the patent below the line of high-water mark—is not well taken.

Mr. DUNNE. The difficulty about amending the complaint is that such proceeding is controlled by the statute, and the statute says "the whole of North Island."

The COURT. Colonel Denis says—he is representing the Government here, and he does not claim anything except what is in red on this map. I can not make him claim anything more.

Mr. DUNNE. But the Government, if your Honor pleases, is controlled by the act of Congress. The authority for this
69 condemnation proceeding comes from the act of Congress. And what the Congress directs is the appraisement of the value of the whole of North Island, and that is the only thing this court can try. It can not shrink the issue by an amendment of the pleadings, and the Government has no power to shrink the scope of that statute by an amendment in these proceedings.

The COURT. It seems to me if your patent conveys you that land, you can do with it what you please, unless you can show me some authority to the contrary. This right that you claim, if it affected the tidal prism, if it is subordinate to the grant and has been so decided, I would like to have the authorities on it.

Mr. Dunne's argument here that his patent carries the title to this land out to this survey, has impressed the court very forcibly, and I would like to have a proceeding here that would be final. At one time I suggested, concerning the other question involvel, that we have two verdicts in the case. Couldn't we here in this case take the opinion of the jury concerning the value of this land outside of the bulkheads, and then the question could be submitted to the Supreme Court concerning the ambiguity of the statute. I think there is an ambiguity if I am right.

Mr. DENIS. If your Honor please, I expect to ask the court
70 to instruct the jury to find three verdicts: One, the value of the land claimed by the defendant, 2,147 acres; another, the value of the land within the high water, 1,297 acres, less a small body of land belonging to the Government; third, the value of the lands outside of the uplands, in other words, the tide and submerged lands. Your Honor made that suggestion months ago and neither side could see its way clear, but as the case has shaped itself, the Government expects to ask you to instruct the jury to find those three verdicts.

The COURT. The burden of deciding what is North Island will be greatly lessened on this court if we can get a verdict specifying the damages separately as to those items; and I apprehend that when such a verdict goes to the Supreme Court, that they could arrive at a correct judgment and end the case.

APRIL 16, 1920—*2 o'clock p. m.*

(Further argument by Mr. Dunne.)

Mr. DENIS. If your Honor will permit me, I would like at this time to offer the map from the report of the House Military Affairs Committee, which you have in your hand, as an exhibit in this case (referring to Exhibit 10).

Mr. DUNNE. To which we object as immaterial, irrelevant, and incompetent for any purpose in this case, and not binding upon the defendant in the action.

Mr. DENIS. Is it on the ground that it is not an official document?

Mr. DUNNE. No, sir; upon the ground that it is an ex parte self-serving paper; and upon the further ground that it contains no data by metes and bounds or other specifications delimiting the boundaries of the property in question. Upon both grounds I object to it as incompetent.

71 Mr. DENIS. I will add to my offer the statement that the map in question and now offered, is a part of an official record, to wit, a report of a committee of Congress—65th Congress, first session—and as a part of that report, it is contended by the Government that it assists in determining what is meant by the language "the whole of North Island."

Mr. DUNNE. And we object to that upon the grounds that we are not bound by any alleged committee of Congress; that this statute is interpretable upon the terms upon the face of it.

The COURT. Well, the meaning of that law—the act of Congress and the whole of North Island, I take it, is a question of law, and the interpretation of that question is for the court. And in considering that question, if there is an ambiguity, I take it that the court may refer to the reports of the committee of Congress, or the maps used by Congress; but my opinion is that the jury has got nothing to do with the interpretation of that law, and therefore this map would be irrelevant. I will sustain the objection. Do you want to mark it?

Mr. DENIS. I would ask that it be marked for identification, if your honor please.

The CLERK. It will be plaintiff's Exhibit 10 for identification.

Mr. DENIS. And I would ask the court to permit me to reserve an exception.

The COURT. Certainly.

72 Whereupon and thereafter, to wit, on April 17th, 1920, by stipulation of counsel, the jury, accompanied by the judge, counsel for the parties, and the official stenographic reporter, proceeded to and did view North Island in San Diego Bay.

APRIL 19, 1920—10 a. m.

The COURT. Are you gentlemen going to read this stipulation to the jury—the documents that were to be considered in evidence?

Mr. DUNNE. I will read the proceedings, your honor.

(The stipulation of counsel, and the documents introduced in evidence by the plaintiff in the absence of the jury, read by Mr. Dunne.)

The COURT. Call your witness.

73 HOWARD C. HOLMES, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

My business or occupation is that of civil engineer. I have been engaged in the practice of my profession for over thirty years. I have practiced it principally in California. I was at one time assistant engineer of the board of State highway commissioners of California for a period of about eight years, from 1875 to 1883; subsequent to that, from 1893 to 1901, I was chief engineer. I was chief engineer of the South Pacific Coast Railroad—that is, relative to water-front matters; consulting engineer for the Western Pacific on water terminal; the Santa Fe; California & Northwestern; the North Pacific Coast; the Key Route—an Oakland line—a line running from San Francisco to Oakland, and known as the San Francisco, Oakland & San Jose Railway; and also the old South Pacific Coast, which is now known as the Alameda Mole, a branch of the Southern Pacific; the Richmond Belt Railroad, which is a water-front affair. I was chief engineer for the San Francisco Dry Dock Company; consulting engineer for the Bethlehem Shipbuilding Company; the Moore Shipbuilding Company, and the Union Iron Works. The Union Works is a branch of the Bethlehem Steel Company. I designed most of the piers on San Francisco Bay during my official career. I designed, as I say, the Alameda Mole; both dry docks at Hunters Point—graving docks; two floating docks for the Bethlehem Steel Company; one for the Moore Shipbuilding Company; and one at Valparaiso, Chili, for the company of Des Diques; and also a dry dock at Esquimault, British Columbia; also the foundation for the Ferry Building, at the foot of Market Street.

74 I am familiar with the property in question here—North Island, in San Diego Bay. I have known that property, I guess, for the past four or five years. I have been on the island and am familiar with its location and area generally. I know the tide-land front of the island, the northwestern front—the tide-land area.

Mr. DUNNE. Q. Now I will ask you, Mr. Holmes, for what purposes, if any, in your judgment, commercially speaking, those tide-lands are adaptable and were adaptable on the first of August, 1917?

Mr. DENIS. To which the Government objects on the ground that it is incompetent, immaterial, and irrelevant, principally in that the proceeding here is for the condemnation of North Island, and the whole of North Island, which consists of the land above the line of high-water mark in San Diego Bay. There is but one word I wish

to add to what was said on Friday, and that is to call your honor's attention to the map accompanying the patent issued by the Government upon the confirmation of this grant. That wholly fails to show North Island eo nomine, by name, whereas the map which was offered to your honor and was marked for identification shows the land that is sought to be condemned under the act of Congress.

The COURT. Is that patent map here? As I understand, the map that is attached to the patent does not name the island North Island.

Mr. DENIS. Instead of that blue print I would like the original patent map to be shown to the court [map exhibited to the court]. The map that Mr. Dilworth is offering your honor is the map attached to the original patent.

The COURT. Well, on this map it is called high land. There is no such word as North Island on it. The law authorizing this
75 proceeding to be brought designates "the whole of North Island." Now, as I understand, the Government claims that the whole of North Island is simply the high land, while the defendant claims that the whole of North Island embraces the survey to the westward of the high land, out to the edge of the anchorage. Now, I am inclined to think, gentlemen, that the jury should be asked to put an appraisement on what is known as high land, separated from this, out to the edge of anchorage, from the line of high-water mark as shown on the patent, out to the edge of the anchorage, and let them state the value of the land, what is called the submerged land—the subaqueous land. And I would like to reserve my ruling on this question until the close of the case. That is agreeable to counsel?

Mr. DUNNE. Yes, sir.

Mr. DENIS. Yes, sir.

Mr. DUNNE. But we will proceed with the introduction of the testimony.

The COURT. Yes, sir; and I will reserve my ruling. It has occurred to me that if the Government should simply claim in this proceeding the high lands and divest itself of any claim of this subaqueous land, that then the defendant would have a right to file a cross complaint to have that assessed under this law.

Mr. DUNNE. A severance damage.

The COURT. Yes, sir; and so far as I am concerned, if we can get a special verdict, it seems to me if we could get a special verdict as to the value of the lands, the uplands, and the value of this subaqueous land, and all of it together—say, three verdicts—that the pleadings need not be changed, and the judgment of the court will be for such damage as the court thinks proper. I will reserve my ruling on the objection made.

Mr. DENIS. That is agreeable to the Government, and this
76 testimony that is about to be offered will not be interrupted by constant objections from the Government.

The COURT. No need. I think you have saved your point now, and there is no need of any further objection.

Mr. DUNNE. Now, will you read the question, Mr. Reporter [question read]?

The WITNESS. They were adaptable for the construction of wharves, slips, piers, and various things I have described—dry docks, shipbuilding plants, landings for freight, to bring the ship and car together—anything that pertains to water front. I have prepared a map, or a plan, explaining the adaptability of that land to the commercial purposes that I have indicated. I have prepared a map showing North Island and the submerged lands, which will present the general situation to the jury (a map was hung on the blackboard).

Mr. DUNNE. I want to say that the data on this map are based upon the United States engineer's map.

The WITNESS. The ocean is shown below this shaded blue line; this is the ocean [indicating]. The ocean lies to the south of Coronado and North Island, this being north, the top of the map north. This indicated the Government breakwater, and north of the island is the Bay of San Diego, or a portion of it. This indicates what is known as Spanish Bight, and this is Whalers Bight [indicating]. This dark line around North Island is the line of ordinary high water, and also the upland, the line of the upland. The colored portion indicates the upland on North Island. The red shaded line indicates the line of submerged land, the boundaries of the island, the patent [indicating]. That red line I have just indicated with my pointer is the survey line taken from the patent that was just handed to his honor. I am following now with my
77 pointer the dotted line which is just outside of the survey line. That is the pierhead line established by the United States Government; that is the line to which it is allowable to build open structures. The other inside line, just outside of the heavy line, is the bulkhead line. That is the line beyond which no solid structures are allowed to be built [indicating]. You will notice the pierhead line crosses the grant line at this point [indicating]. In other words, the grant line extends beyond the pierhead line. The acreage in that little triangle formed where the grant lies overlaps the pierhead line is about 4.7.

The COURT. That is to say, the pierhead line crosses inside of the patent line, and there is about 4.7 acres outside the pierhead line.

The WITNESS. The beach land between this bulkhead line and the heavy line, or the line of ordinary high water mark, averages about 250 feet in width; it runs from approximately 250 to 300 feet in width. I couldn't say what the acreage is. The acreage of the tide lands I have designated here is 663.3. The exact figures on this map for the acreage of the uplands are 1,495.3; that includes the Government reservation of 57.43 acres. That leaves net about 1,438 acres. I am familiar with this map which you hand me, with the segregations of acreage thereon. The land that will be strictly upland will be 1,232.93 acres. The marsh land of Whalers Bight will be 66.09. The Whalers Bight spit will be 11.42. The south ocean

front, that is, the portion that comes below here, that has been eroded by the ocean, is made up of two portions, one on the island proper of 32.52, and one opposite the bar or spit there of 39.1 acres. And then there is a piece of meadow land, 15.05. That is at Spanish
78 Bight. That is about all the upland. That 15 acres was not erosion. The erosion is here [indicating].

Mr. DUNNE. I will ask that this map go in evidence, and this will be our Exhibit 1.

The CLERK. It will be defendant's Exhibit B, Mr. Dunne.

Mr. DUNNE. Very well, I will ask the jury to look at this map, so that they can see the areas over and above the 1,232 acres of the high land.

Mr. DENIS. If your honor please, the Government will not object to the map, so far as it indicates the upland, but it will be subject to our objection.

Mr. DUNNE. It will be subject to your objection. The objection will pursue the examination.

(The map marked "Defendant's Exhibit B" was exhibited to the jury.)

Mr. DUNNE. I will offer that map in evidence as defendant's Exhibit C.

The CLERK. Defendant's Exhibit C.

The WITNESS. I have prepared two maps or diagrams, one on this scale and one on a little larger scale, illustrating the commercial adaptability of these tide lands, as I understand such adaptabilities to exist (map is placed in position on the board).

Mr. DENIS. Before that map is exhibited, the Government wishes to object to it, your honor, on the ground that it is incompetent, immaterial, and irrelevant.

The COURT. I understand it is only offered for the purpose of illustrating the testimony of the witness.

Mr. DUNNE. Yes, sir; for no other purpose.

Mr. DENIS. That is the basis of the objection—the testimony of the witness to show by map or other illustration the subdivision of
79 the property is irrelevant, incompetent, and immaterial, and includes the objectionable evidence of speculative value. I will concede, of course, that the witness for the defendant may testify to the highest price for which the property is adaptable, but I must contest the proposition that in showing that highest price they are permitted to show the number of residential lots into which that property may be subdivided. They can testify that it is subject to subdivision, but not to the subdivision of the property into lots, especially if it be followed by testimony as to what those lots may be worth after subdivision.

The COURT. Well, I think the latter statement is true—that they would not be permitted to testify to what separate lots are worth.

Mr. DUNNE. Oh, no. This is a strictly limited offer, for the purpose of illustrating the testimony of the witness.

The COURT. Well, as a part of the witness's testimony, it may be exhibited to the jury. It is understood, of course, that the speculative value can not be put upon this land.

Mr. DENIS. The Government excepts. Your honor, can it be stipulated——

Mr. DUNNE. Yes, indeed, Colonel.

The COURT. Rulings will be excepted to.

Mr. DENIS. That the rulings will be excepted to.

The COURT. All right.

Mr. DENIS. I don't know that it is strictly regular, but I thought it would save time.

The COURT. I think the provisions of the Code of Civil Procedure of California apply here, and you might stipulate it.

Mr. DUNNE. Yes, sir; and I will join with Col. Denis.

Mr. DENIS. Well, I think myself it is advisable to save the time of the court.

The WITNESS. The line along here following down here is
80 just within the grant line—the United States patent line. This portion open, showing an open portion, is where the grant line overlaps the Government pierhead line. Along here, at the back of the pier, as shown on here, represents the Government's bulkhead line. This shaded portion along here represents what is known ordinarily as an apron wharf, that is, a wharf that overlaps and protects a seawall. That horizontal wharf, as you call it, in contradistinction from the municipal pier, is what is designated as an apron wharf—an apron or bulkhead wharf. And it is best illustrated in this cross section here. You see the apron wharf extends to here. For instance, you might say this is the line of the municipal pier, and that would be their apron wharf. For instance, this was what would be called the water front street, from the bow of this vessel into the building, as indicated here. The pier extending into the water and away from the embankment would be what would be known as an apron wharf. In other words it is a half wharf, half on the shore and half in the water. This thoroughfare along here would consist of an apron wharf, say 60 feet in width, and the balance of the fill, some 140 feet in width. That thoroughfare runs just inside of the bluff—or just outside of the buss of the upland on North Island—seaward. The bluff there is 8 to 12 feet in height. If you stood upon the brink of that bluff you would be looking down on this stretch of beach land that you speak of, from 150 to 350 feet wide. The apron wharf would be established upon that beach, but of course, the beach would be raised. In other words the proper height for a wharf of that character would be probably from four to six feet above ordinary high water. That inner basin could be made adaptable for shipping by dredging. The depth of water, now, taken from low water, out to the anchorage or shipping chan-
81 nel averages about five feet. The embarcadero, or strip below the bluff where the apron wharf would be established, would be filled with the spoils from the dredger, from dredging this basin, to a depth of thirty feet. That fill would rise along the embarcadero

for an extent of from five to six feet above high water, but you could also fill this marsh. It is the intention, in this plan, to fill the marsh and what is known as Whalers Bight, to approximately the height of the adjacent mesa. This thoroughfare or embarcadero, would consist of a street, say, from 150 to 200 feet in width, about five or six feet above high water. On that could be placed railroad tracts, and from that projecting at the different angles, would be these various piers. They would be approximately a thousand feet long and two hundred feet in width. Up at the upper end could be located the ship building plant, with a floating dry-dock, as shown in this section here; a floating dry dock with a capacity of, say, 10,000 tons dead lift. Next to that could be located a fuel oil plant with its tanks on the upper land, and its wharf and railroad tracks in front and at the rear. Next to that could be located a vegetable oil plant. There is quite a demand for cocoanut oil at the present time. There are several plants in San Francisco and around the bay. That could be located with its tanks and its warehouses and its tracks both front and rear, and the tracks also running down the wharf. Next to that could be located a wharf for oriental shipping, one for European shipping, and these wharves down here could be used for general merchandise. Along here could be located wharves and tracks for the purposes of handling building materials. Along here another wharf for the purpose of handling lumber, that is, bring it in in the form of a raft and sawing it up; also timber preserving works. All kinds of commodities could
82 be handled here, the same as in a seaport. That property is adaptable for a railroad terminal. A terminal as was sketched out at the right hand corner; a railroad terminal having railroad connections by means of car ferry, and by means of a railroad across the bridge here. Say the San Diego and Arizona Railroad, which is at present on the island, tracks could be brought in here, and a railroad distributing yard, bringing this railroad in contact with the shipping—bringing ships and cars together. The Santa Fe could be brought across by means of car floats or car ferries. It is also designed for a passenger slip here connecting with San Diego proper. I can best demonstrate the way in which the upland is adaptable for warehouse or industrial structures, by this cross section here. This warehouse has railroad facilities at the lower level or embarcadero level, some four or five feet above high water, the warehouse running to the rear—this back street here, the land being some eight to twelve feet higher, the goods could be handled in a second-story warehouse, and the streets connecting would be on a very gentle grade, say from one to three. For instance, this grade here would be about a three per cent grade. This is done a great deal in Brooklyn, N. Y., where they have elevators on the outside of the building, and the goods handled up and down in front, and also in the rear, and there are several cases where the goods are taken up at the rear, which is higher than in front. In other words it would not be necessary to cut all this land down and level this street down. The ground could be used as it is at the present time. I am familiar with tideland values.

Mr. DUNNE. In your judgment, having regard to the commercial adaptabilities of those tidelands on the 1st of August, 1917, what, in your opinion, was their fair market value?

Mr. DENIS. I object to the question on the ground that it is
83 incompetent, irrelevant, and immaterial unless the witness shows that he was familiar with tideland values in the Bay of San Diego. His knowledge is evidently an intimate knowledge of values in the Bay of San Francisco. I do not think that establishes his qualification to testify to values in San Diego any more than his knowledge of values on the Hudson River qualifies him to testify to values in the Port of Seattle; nor has he shown that his knowledge of values is based upon the present needs of the communities in San Diego in the immediate future, under the authority of Boom Company vs. Patterson.

The COURT. It evidently relates to the first of August, 1917. There are some cases, as I understand it, that comment upon the fact that the familiarity of the witness's knowledge subsequent to the time the value was to be fixed is not admissible. Is that right?

Mr. DENIS. I don't think so; altogether, your Honor, there is an authority under certain circumstances, for a different rule, but that is not the point that I am making. This witness has not established a familiarity with the value of tidelands in San Diego Bay, and that is the principal basis of my objection. In San Diego Bay on August 1, 1917; that is the principal basis of my objection.

Mr. DUNNE. The point of the question is that the witness, as an expert civil engineer, familiar with tideland and water front constructions for a long period of years, has probably done more of that construction than any other man in the State of California, that he is competent as an expert to express an opinion as to the value of these tidelands, in view of their commercial adaptabilities. The general condition surrounding tidelands in San Diego Bay and in San Francisco Bay would have a measure of similarity, and experi-
ence gathered in San Francisco Bay would qualify a witness to
84 speak intelligently as to tideland and water front values in San Diego Bay. It is from that point of view that I put the question to Mr. Holmes as to value.

Mr. DENIS. I would suggest to your honor that manifestly you have only to look at that map to see that the testimony of this witness does not contemplate a value as of August 1, 1917, and whatever testimony he gives must be of present value, either for industrial or any other purpose.

The COURT. You don't mean by present value a value of August 1, 1917?

Mr. DENIS. Well, that is substantially the same thing. I mean as of August 1, 1917.

The COURT. The cases pretty near say that most anybody could give his opinion concerning the value, but the value of his opinion is another thing.

Mr. DENIS. I concede that, but I think the witness must show that he knows something of the value at a time stated.

The COURT. Witnesses will probably be brought here from a distance that were not familiar with this bay in 1917 and familiar with the value at that time. It seems to me like it may be an important question.

Mr. DUNNE. The situation, if your honor please, is peculiar in this case. The tidelands here in point of area, extent, and adaptability are unique, in a class by themselves; perhaps no replica of it anywhere in the State of California. Under those circumstances it can not be said to have a market value in the sense that a 25-feet lot has a market value, and, under those circumstances, well-informed persons may be inquired of as to their opinions touching the value of such property. I am now inquiring of this witness his opinion touching the market value of the property, in view of its adaptability for the purposes indicated upon this map, not as to its value
85 when all these improvements have been made and constructed and you have a going concern. Such a value might be fabulous, but its present value, or its value as of the 1st of August, 1917, in view of the fact that that intact and unbroken water-front ownership is presently adaptable to these commercial uses, and was so adaptable in August, 1917.

Mr. DENIS. The point that I make is not as to the lack of qualification of this witness, but I want the witness asked whether he knows the value of tideland as of that date, or approximately that date.

Mr. DUNNE. I think I can put a question to Mr. Holmes which he can answer:

Q. Now, I will ask you what, in your judgment, was the fair market value of these tidelands as of August 1, 1917?

A. I think a conservative estimate would be between five and six thousand dollars per acre.

Cross-examination by Mr. DENIS:

Q. In making the map which is marked D, and which is the one before you, was that map made with a view of the adaptability of the land in August, 1917?

A. Yes, sir.

Q. That would be the adaptability of the land regardless of the wants or needs of the community of San Diego, would it not?

A. Well, to a certain extent——

Q. I mean in 1917.

A. In 1917; no. At that very time?

Q. Well, approximately that very time. I think we agree.

A. No; I think there were needs for that; yes, sir.

It is not a fact that that map is made to show the possible
86 uses in the future of those lands; it is what it could be adapted to at the present day, or what it could have been two years ago. You could create a need for oriental wharves or European wharves or any of the things that I marked on that map by making

that—not create it on paper regardless of the fact whether there is a need for it. We create them because we know that this is the point nearest to the Panama Canal; that it has connections with Imperial Valley and with Mexico; that there is a short line to the Orient, and really a short line to Europe, which is nearer the great circle, even, than San Francisco. This land is no nearer the great circle or the Panama Canal than the land belonging to the city of San Diego on the other side. I know that there is a very large area of tideland on the San Diego side of the bay. I don't know that there are thousands of acres of such tidelands not yet put to any use. I know there are not thousands of acres available; in fact, I know to the contrary. I don't hardly think hundreds of acres. The greater portion of the tidelands available for commerce in San Diego Bay, and on the San Diego side of the bay, has already been disposed of. Not all of it is in actual use; some of it is in actual use. The area of tidelands in actual use, as compared with the area of tidelands not yet put to any actual use, is very small. It would have to be reclaimed—most of the land that is not in actual use. The portion which is in actual use is very small as compared with the area that has not been reclaimed. I have seen a map prepared. I saw it some years ago. I came down here some two years ago; I think it was in 1918 or 1917, for the Bethlehem Steel Company, to locate a plant, a shipbuilding plant here, and at that time we found the land was pretty well occupied. The only available land at that time was up between the Standard Oil Company's prop-
87 erty and the concrete-ship building plant. By "pretty well occupied," I mean it was not available; that is what I mean to say. It was not available because it had been disposed of to the Government and to private parties. The portion we could get was a part that was assigned by the Government to the concrete-ship building plant. I referred to a vegetable-oil plant, and I have indicated that by a wharf marked "vegetable oil." I mentioned
88 in my direct examination that vegetable oil was commencing to be quite an industry in San Francisco—I think for the past three or four years. It was no part of the industry of San Diego Bay in 1917. I said three or four years. I will qualify that. I will say two or three years in San Francisco Bay. In 1917, so far as the vegetable-oil business was concerned, there was no such business existing in San Diego Bay. This map was made in March, 1920. I base my estimate of five or six thousand dollars an acre for these tidelands on tidelands in San Francisco Bay that are similarly adaptable, hardly as good as this tideland here, and land I have had more or less to do with in developing. Tideland contiguous to a community of a half million inhabitants is the measure of my estimate for tidelands contiguous to a community of 100,000. I would not say the same things of tidelands contiguous to the city of New York as compared to these—nor I wouldn't say—the value of this land twenty years from now would be almost inconceivable. The value of these tidelands—its proportional value—is about the

same proportion that the populace of San Francisco would be to the populace of San Diego to a certain degree, but not fully, because a ship will pay the same rates for wharfage, dockage, and toll in San Diego that she would in San Francisco, and you would get the same freight rates from San Francisco probably to New Orleans that you would from San Diego to New Orleans. I base my estimate of five to six thousand dollars an acre on these tidelands for their value in August, 1917, as they stood, without any reclamation, from the fact that they were adaptable to be improved, as shown. In making this map, and in all of my direct testimony, I took into consideration the business needs of San Diego at that time or in the immediate future. In making these various walls and pictures there on that map I considered that it could be developed; it
89 was a nucleus for that, and as the needs required it the land could be developed, but it was there and adaptable to be developed. It is not a fact, from my knowledge of the business wants of San Diego, that it will be 20 or 25 years before this land can be used, as I have shown it to be adapted. I don't think it would be 20 or 25 years; it might be 10 or 12 years, something like that. Business of that sort, when it once starts, grows very rapidly. But I do not pretend there is any use, any present use, for that elaborate scheme I have pictured there in 1917. I don't think there would be at that time.

Redirect examination by Mr. DUNNE:

I am trying to indicate that the lands were adaptable in 1917 for such purposes. I took into consideration that these tide lands were upon the Bay of San Diego, and the geographical and economic relations of the port of San Diego to the rest of the country. I took Imperial Valley into consideration, and the circumstance that San Diego and San Diego Bay, and the Mexican and South American coast, is the natural port of distribution. I took into consideration the circumstance that San Diego Bay is the approximate port of distribution for transcontinental business moving west by the Panama Canal, instead of all rail to other terminal points.

By Mr. DENIS:

Q. In preparing this map shown on Exhibit D did you not have in mind an estimate of the value of the property as testified, five to six thousand dollars an acre, an investment of a very large sum of money to carry this plan through?

A. Yes, sir.

Mr. DENIS. I move to have the testimony, all of the testimony as to value given by this witness, stricken out.

90 Mr. DUNNE. I would like to ask the witness a question.

Q. You don't mean to say, Mr. Holmes, do you, that you were figuring on profits that could be made out of the investment?

A. No, sir.

Q. You mean to say you can not adapt property to use for nothing; isn't that what you meant to be understood?

A. I had in mind it would cost something. There was not any speculative profits, if that is what you mean.

Mr. DENIS. I would ask the court to rule.

The COURT. Upon the modification of his testimony I think it is properly in, and I will overrule the motion to strike.

The WITNESS. Islais Creek is a part of the tide lands of San Francisco. It is about two and a half to 2¾ miles from the center of San Francisco, the business center. The tide land at Islais Creek is not anywhere near as adaptable for commercial purposes as the tide lands in question. In the first place, the water varies on the tide lands known as Islais Creek tide lands from 5 to 30 feet in depth. The foundation, that is the bottom, the pile foundation, is virtually bottomless, the subsoil being what is known as silt, soft mud. In other words, you drive in your pile into the mud at Islais Creek, and at the last blow of a 3,000-pound hammer it will go probably an inch to two inches to the blow. Whereas, in this, it is absolutely solid foundation, sand bottom, none better. And furthermore, in reclaiming the property at Islais Creek you would necessarily have to have a rock retaining wall, and it would require probably years before the land could be built on, on account of the settlement of that character of fill, whereas you could follow your dredge on this character of
90 fill, as I have seen it here in what is known as Dutch Flats and also at the ferry building at Coronado.

LOUIS C. MASTEN, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

I live in San Diego, and have lived there approximately 15 years. That has been, by and large, a continuous residence. During that time I have been engaged in the real estate business. The name of the business with which I am connected originally was Masten & Kendall; later Louis C. Masten. I am still engaged in the real estate business here. My office is in the Timken Building, in this city. Previous to coming to San Diego I was with the Southern Pacific Railroad Company and the Pacific Electric, in Los Angeles. Previous to that I was auditor of the Maricopa & Phoenix Railroad, in Phoenix, Arizona. Prior to that I was in the banking business in San Francisco. The period of time covered by my business experience, first and last, is about 25 years—28 years. I know North Island, and have known it about 15 years. I am very familiar with that property. I have been on it in my automobile; I have walked across it; I have been around it in my boat, when I owned one, a great deal; and I have seen it from an aeroplane; and also my residence is on the bluffs, or rather on the hill in Horton's addition here, where I see the island practically every day, whenever I am home. I have been on the island, I would say, a couple of dozen times. During the course
92 of my experience in real estate in San Diego, I became familiar with real estate values, both for residential and for commercial purposes; and I am familiar with real estate values, both residential

and commercial, in the San Diego Bay district region; and I was so familiar on the 1st of August, 1917. At that date, in my judgment, speaking generally, North Island was adaptable splendidly for residential purposes. It was adaptable for commercial purposes. It was splendidly adaptable for residential purposes, as of August 1st, 1917. It consisted of an absolute unit, owned by one man, readily converted into blocks and lots for residences, for villa sites, and the water feature of the submerged lands for aquatic sports, swimming pools, yacht harbor, and the like, and it could have been used for hotels and apartment houses. It was very well adapted for residential purposes. When I speak of its adaptability to residential purposes, I speak only of the uplands, about 1,233 acres. The land on the water front of cities so situated overlooking the water is, as a general rule, very desirable, and I would consider that North Island is practically all water front property. There is some inside property, but not such a large extent as there is water front. It is to a large extent water front property, however, for the reason that there is no part of it that is distant more than a mile and an eighth from the water. The inner basin, or the basin, the submerged lands, are adaptable for yacht harbors, and the like, and readily lend themselves to the use of boats for people who can afford them. As to the marine zone, or land of this property as being desirable where it overlooks the water, I think I would go back about 1,200 feet from the shore, all around the island, and cut it up into large villa sites. I would use the inner zone for smaller residences and less expensive property. I caused a map to be prepared, indicative of the outer and inner zoning
93 that I have just mentioned. That is the map [indicating map produced by counsel].

Mr. DUNNE. I will offer this simply as illustrative of the witness's testimony, Colonel.

Mr. DENIS. I would like to know before you complete your offer, who made it and how accurate it is.

Mr. DUNNE. It is simply the division of the 1233 acres which we are agreed upon between the outer and inner zones.

The WITNESS. The lands of that outer zone can be subdivided into villa lots, with streets and alleys. By villa lots, generally speaking, I mean larger lots than the ordinary city subdivision; usually of an acre, an acre and a half, two acres and more. The inner zone could also be divided up into residence lots and home sites. Practically the entire area of the two zones marked here is made up of mesa land, without hills and without canyons. It slopes gently toward the water, and is, generally speaking, without going over it with an instrument, flat, a trifle higher in the center than on the shores. The soil is—well, about as near as I can say, what you would find in your garden, if you had a good garden, and is adapted to arbor culture, and trees and shrubs. A house builded on this land could be in a very short time surrounded with flowers and be made extremely attractive. The climate, I think, over there is better than the climate in San Diego and Coronado. In looking at North Island from my window

in the morning, I frequently noticed that it is perfectly clear over North Island, where the uplands of San Diego would be covered with fog, when the North Island shore and North Island itself was absolutely free. I believe that Point Loma deflects the fog and the wind from North Island. I would say that the climate of North Islands is very similar to that of Coronado Island, except in this instance
94 of fog of which I speak; and in that instance, and wind also, the advantage lies decidely with North Island. In relation to tide lands for the purpose of adaptation to the residential features of the case, I am not including at this time the commercial point of view. With a very small amount of dredging, and the placing of the spoils on the present inner ground, a very pretty and serviceable yacht basin could be made of the inner basin, where small boats might have their anchorage, and where they might have their fun, we might say, where yachts could be anchored for those who owned such things. A swimming park might be made there, and it could also be used for fishing. I have often thought of that, or rather I thought of that in connection with Glorietta Bay, which is on South Island, that is used that way. I am familiar with the expression sometimes used in municipal administration of "water park," or "aquatic park." This water land would be adaptable from that point of view. I have been in many cities in the East, New York, Chicago, St. Louis, Kansas City, Omaha, New Orleans, Philadelphia, Atlantic City, and I have also been in practically all the principal cities on the west coast—the Pacific coast. I have been in Seattle, Portland, Tacoma, Sacramento, Stockton, El Paso, Phoenix, Arizona, Tucson, Los Angeles, San Francisco—practically all of the large cities on the Pacific coast. This land, North Island, in respect to its availability and desirability for high-class and moderately developed residential purposes, is as good as any in the United States, generally. I do not know anywhere in the United States a more desirable or suitable place for high-class residences than North Island. North Island is located to the north of Coronado, and is connected therewith by a narrow strip of land that is shown on the ocean front. This narrow neck of land is several hundred yards wide, and connects North Island with Coro-
95 nado [indicating on map]. That strip of land between the islands is adaptable for a boulevard. Earlier than 1917 that strip of land was used for communication and access between the islands. When this jetty was built they carried many thousand tons of rock in steam cars or by the railroad across this narrow neck of land. Besides the communication and access between the two islands by solid land there is at present a bridge across here—two bridges, in fact, on one of which the San Diego & Arizona Railroad has its tracks. Spanish Bight, at the place indicated by the railroad track, is adaptable for a bridge for foot passengers, vehicles, and railroad trains, and was so adaptable on the first of August, 1917. In my judgment this property ws adaptable on the first of August, 1917, for commercial purposes. The island, as I

have said before, is almost level. It could very easily be converted into railroad yards, transfer points, sites for warehouses, business blocks, if need be—very adaptable for that. These commercial adaptabilities would be availed of on that part of the island that is adjacent to the submerged lands. I am familiar with water-front conditions and tide-land values in San Diego Bay. The condition of the city water front for its availability for commercial enterprises is and was in 1917—a very large portion of it—taken up under lease from the city of San Diego. It has been largely absorbed with enterprises of various characters, fish canneries, fish warehouses, boat shops, the municipal pier, the Spreckels Wharf, the Santa Fe Wharf, the Pacific Coast Steamship Company's Wharf, the Benson Lumber Mill, the McCormick, the Standard Oil, and so on. Those, by and large, were relatively small holdings as compared with these tide lands.

Mr. DUNNE. I will ask to have this map used by the witness for illustrating the outer and inner zones marked "Defendant's Exhibit E."

96 The CLERK. Defendant's Exhibit E.

The WITNESS (map shown witness). I recognize this map—the United States engineer's map. I am familiar with it. Commencing here at the south line of the city, we find that this land is taken up by the Government of the United States, and is the point at which the concrete ships are being constructed. Further along we have the old franchise of the Buchanan Lumber Company. And as you go along you will find other enterprises. I can't recall them all. This is the land owned by the Government, and upon which at present is being built the marine base. Over here is the land owned by the Government, which is given to it by the city of San Diego for use of the naval training station [indicating on map]. These colored portions in between represent the small private holdings that I have referred to; they are in the nature of leases from the city—twenty-five and fifty year leases. Ever since I have been here the city has pursued that policy of putting the water front in such proprietary relation.

Mr. DUNNE. I will offer that Government map in evidence as our Exhibit F.

The CLERK. Defendant's Exhibit F.

The WITNESS. The circumstance that a large tract of land like North Island, regarded from the point of view of any use, residential or commercial, for which it is adaptable, is in a unitary, single ownership—that it has wholeness of ownership for the purposes of purchase and sale—is, in my judgment, a factor or element of value in respect to the property. Under one ownership any piece of property, any enterprise, can be handled as a unit. It is susceptible to improvement according to the ideas of the one person. You don't have to go about getting the consent of other people, other corporations, who might be unwilling to submit to improvements of any kind.

97 Mr. DUNNE. Q. Now, Mr. Masten, I will ask you, having in view the purposes to which this land is adaptable, and as of the first day of August, 1917, I will ask you what, in your judgment, was the fair market value of that entire tract as of that date?

Mr. DENIS. Meaning the upland?

Mr. DUNNE. No; I mean the uplands and the tidelands—the entire tract.

Mr. DENIS. I object to the question on the ground that the witness, from my recollection, has not qualified himself to testify to the value of the tidelands.

Mr. DUNNE. Oh, yes; I asked him particularly.

The COURT. Well, does he know the area? He has not said anything about the area.

Mr. DENIS. That is the ground of my objection.

Mr. DUNNE. Do you know the area of the tidelands?

A. I do; 663 acres.

The COURT. And you think you know the value of the land, including the uplands and that subaqueous land?

A. I think I do.

The COURT. Overruled.

Mr. DUNNE. Q. As of the first day of August, 1917, Mr. Masten, what is your judgment, regard being had to all the purposes to which the land as an entirety is adaptable—what, in your opinion, was its fair market value as of August first, 1917?

A. I would say $7,035,190.

Mr. DUNNE. That is all.

The COURT. Let this witness stand down. I would like to ask Mr. Holmes a question before we take a recess.

98 HOWARD C. HOLMES (recalled).

The COURT. Q. In giving your estimate of the value of these lands, did you base your opinion upon anticipated investments of a large amount of money or expensive improvements and water works, or did you base it upon simply the adaptability of the land as of August 1st, 1917?

A. I based it upon the adaptability of the land as it was in August, 1917.

LOUIS C. MASTEN (recalled).

Cross-examination by Mr. DENIS:

During the fifteen years that I have been in the real estate business I have subdivided but one property. It is a small piece, 40 or 50 acres. I have had no other subdivision on the market. In August, 1917, these lands could have been made use of for homesites, for business purposes, and for commercial purposes. The value of North Island, $7,035,190, is not the subdivision value. If that piece was subdivided, it would be worth very many more times than the figure that I have given, very much more. That is the answer to the question that you have asked me. I have absolutely not taken into consideration at all its value after it was subdivided. That value of

seven millions was the present or rather the actual value of North Island in 1917. The value of the submerged lands I put in at $870,540. That would be $1,000 per acre. The upland, 1,232.93 acres, $6,164,650, at $5,000 per acre. I arrived at the value of $1,000 per acre for the tidelands by comparing it with the sale of other tidelands about the city of San Diego. Practically all of the tidelands or lands susceptible or adaptable for marine purposes, have been taken up—were not available for purchasers. I will take the figure from you, that there is more than three miles of water front in the control of the city under the act of 1911 that is still available for commercial and marine purposes, not in the hands of private ownership. I don't know the exact figure. There is some considerable amount that is not available, but that is tidelands considerable distant from the center of town, on the Point Loma side of the bay. I don't know how many leases the city and State together have made, of tidelands on the Bay of San Diego, up to date. I do not know the rate per annum per acre at which the city is leasing tidelands to industrial enterprises. I can not approximate it in any way; it would be a guess. In my estimate of value I did not take into consideration the cost of improving as large a body of land as 1,200 acres. In estimating a value of $6,000,000 for the upland, I did not take into consideration the length of time which would elapse before the owner could dispose of his property on the market. I did not think it was necessary. I think that if a piece of property should be thrown on the market—should have been thrown on the market at any time previous to August, 1917, that it would not have taken a very long time to have sold it, on account of its desirability. Coronado Island and North Island are very similar from the standpoint of soil. The climate is similar, I think the favor being toward North Island on account of the fact that the winds are tempered on North Island by the Point Loma Headland; also, the fog, instead of coming over Point Loma, goes around the edge and sweeps in over Coronado, through some considerable extent. I would say that the accessibility of North Island and Coronado Island is practically the same. In these days of transportation, ferry boats and one thing and another, why, they are almost exactly the same. In August, 1917, the ferry transportation to North Island was not as accessible as the ferry transportation to Coronado Island. It had not been developed at that time.

The COURT. You speak, Colonel Denis, of Coronado Island. There might be some confusion arise from that. It is called South Island, as I understand.

Mr. DENIS. It is now called Coronado Island, but I will call it South Island. I think you understood what I meant.

The WITNESS. Oh, perfectly. In August, 1917, the transportation facilities to North Island were not the same as the transportation facilities to South Island. In 1917 South Island had direct access to the ferry, the ferry landing right on South Island. The island of Coronado, straight across, would be about a mile and a half; then

they would have to go about another mile to get onto North Island on the west coast. South Island was subdivided and put on the market for sale about 1888. I have been told that there was a very great real estate boom in 1887 and 1888. I do not know what proportion of the subdivision called Coronado still remains in its original ownership. I would not say that it is as much as 40 per cent. I do not know. I know that some of the property is still in the ownership of the defendant company. If it were true that 40 per cent of the whole of the subdivision put upon the market in 1887 was still in the ownership of the defendant here, I would not change my opinion relative to the speedy disposition of lands on North Island. I think in my direct examination I brought out why the land on Coronado Island or in Coronado subdivision has not been disposed of in more than thirty years, and yet the land on North Island would be disposed of in some, as yet unnamed, period of time. At present North Island is under one ownership and can be handled exactly as the
101 owner chooses. And besides that, if it were subdivided in a modern way it would have just as large a sale, in my opinion, as Long Beach, Miramar, Montecito, Pasadena, and other places have. The demand for it would be very large, in my opinion. When I refer to sales at Montecito and Long Beach and the various places named I am giving you to understand that I base upon those sales my answer that North Island would be readily disposed of. I am basing my answer on the knowledge that such properties have been sold; not the whole of the subdivision; such properties have been sold, and there is more or less demand for high-class property of that kind. I do not know whether the demand is more or less. I don't know what proportion of the Montecito subdivisions have been disposed of. I do not know anything about the Pebbly Beach subdivision in Monterey County. I know what the movement in subdivision property is in Long Beach is only by real estate items; that is all, not from any personal knowledge. I know particularly one particular friend of mine that has bought property at Marimar and paid a fancy price for it. I don't know the acreage of that sale. Possibly near five acres. It comes to me through my wife and her friends. That is about the information I have. I do not know of any other sales at Miramar. I do not know how large the subdivision of Miramar is. I haven't had anything to do with any outside subdivision other than San Diego. I do not know how large the subdivision of Montecito is. I do not know, either of my own knowledge or from hearsay, of the size of subdivisions in or around Long Beach. In my preparation for testifying in this case I haven't figured the cost of improving and subdividing this 1,200 acres of upland—not even the number of miles in which the streets would be platted, nor the cost per mile, nor the lighting system, nor the water system, nor any other improvements in a subdivision. In arriving at the
102 market value of North Island, to wit, more than seven million dollars, I took into consideration the availability of water for such a subdivision. The water would come from across—either from

San Diego or from Coronado. I knew that there was a sufficient amount of water from Coronado to supply a subdivision of twelve hundred and odd acres. If I figured how much water would be required to supply 1,200 acres of high residential property, it would be a guess. I don't want to guess on it. I have stated that I took into consideration a sufficient water supply to furnish a high-class residential subdivision on North Island, and I stated that I knew there was enough water for that purpose. There is sufficient water about San Diego and the bay region to supply an increased population to the city of San Diego, of which this subdivision would be a part; a subdivision of which I speak, villa sites, and a large acreage in the homes, would not require a tremendous abundance of water. It would not have so large a population as a thickly settled residence section would have. My attitude is, to an extent, that a well built up community of closely connected homes, buildings without yards, requires more water than a highly developed villa site region, with acres and acres of lawns and trees, various vegetation requiring irrigation—I withdraw, if I may, my answer. It was not expected, and I was not—I am not prepared to talk on the water question. I know pretty thoroughly well that borings throughout this section here have produced water at about 750 feet in large quantities—artesian water, as a matter of fact. They had one well in Palm Canyon that produced about thirty thousand gallons of water a day. That is the only one that I know of that the flow of water was assured. However, I do know that there is a well in Mission Valley which produces artesian water at a depth of something like 900 feet. A well in the park is about 750 feet
103 deep. They drilled a well Sorrento, looking for oil. They struck an abundance of water there at about that depth. They drilled a well on the Payay Hills up here 12 or 13 miles, and they struck artesian water—not artesian, but an abundance of water there. The well in Palm Canyon, in the park, was one of the first sources of supply for the city of San Diego. The wells of which I speak have been drilled within the last five or six years. I do not know what the daily capacity of the well in Palm Canyon is today; but all I am advancing there is that it is my theory that there is plenty of water under San Diego for any purpose. My home is in Horton subdivision. It is up here a mile due north; approximately a mile north. Loma Portal and Loma Alta are subdivisions on Point Loma. There are lots of subdivisions. Loma Portal was the prominent one. That was subdivided within the last four or five years. I can not recall Point Loma Villas from the name. The Loma Portal subdivision was possibly forty acres, just a guess. It is very beautiful land. I do not know how much of that property has been marketed since it was put on the market. I will say a good deal of it. Somewhere along about half of it. I am not selling any Loma Portal property. I kind of see the name, Point Loma Villas, but I can not identify the property. I know it is a subdivision, but I can not identify it. I have seen transfers of Loma Portal property since

1913. I think there have been a number of sales made in Loma Portal property since 1913 or 1914. In my business experience I do not know of the subdivision for high-class residential purposes of a tract of land of 1,200 acres in extent. I have never heard of a subdivision of land in excess of 500 acres for residential purposes at the same time. I know that South Island was subdivided into what is known as Coronado about 1887. I would think that that subdivision is approximately in the neighborhood of 600 acres. I
104 stated that I did not know what proportion remained in the original ownership. Coronado City, when it was divided in 1887, was in a single ownership. This same ownership is the defendant here, the Coronado Beach Company. I know Mr. John D. Spreckles; have known him possibly ten years. Our relations are friendly. I have written a few insurance policies for him. In my calculation as to the market value of North Island in 1917 I did not consider how long it would take—how many years it would take to dispose of that property. I thought of the interest proposition in making my figures; but if you consider interest in there, I think you should also consider or be allowed—if a man works at it from that standpoint he should be also allowed to figure on the speculative value of the land, because the land in question no doubt would increase in value as the years went on. That is just a thought that I have had. Of course, I know that every subdivider considers the price that he pays, interest on that price, the probable or estimated cost of improvements, interest on the estimated cost, with his guess of the number of years that it would take him to dispose of his property. But we are figuring right now on the market value of the land at the present time, not what we are going to put into it, because if we go and put in and figure in the interest and the cost of the streets and putting in the trees and the gas mains and sewers and the electric lights, and sidewalking it and curbing it, we add that price, to be sure, to the bare value of the land which I have given you here; but when you sell that land we add not only the cost of those several things, but we add interest, we add taxes and everything else; and under those circumstances, if you are asking me a figure of that kind, why, I would say that the value of that land was—well, it is hard to say. If a millionaire were to come to San Diego and apply to me to find an investment for him where
105 he would be reasonably safe in getting his money out of his investment, he would surely ask me to make a calculation of all those things. First, the seven millions; next, the interest on that for such time as I assured him I could sell the land; next, the cost of improvements—the electroliers, the paved streets, the sewers, the water mains—all that goes to make up a completely improved tract. And I would answer you just as I have before, that if you are going to ask me what the speculative value of that land is, which you have not done, I would say it would be worth, after we put in the cost of these various improvements that we have mentioned, it would be worth very much more than I have given as the value of

that land at the present time. Then, after giving those figures to my client, I would give him, or he would ask me how much I would get out of the land for him; that is the way these things are done. That is the method of procedure I would use. That is what I did in the subdivision of those forty acres I have referred to as the only subdivision with which I have had any experience. I am not figuring the worth of this land for subdivisional purposes, as I stated before. I am estimating it and giving my value for the of the land as I see it today, not for subdivisional purposes. I said the land was adapted to subdivision purposes for villa lots and smaller villa lots. It is adapted for villa lots and smaller villa lots; that is the reason I gave the price of seven millon dollars—six million dollars for the residence part. I stated the value to be $5,000 an acre, because that is my judgment of the value of the land, because it was adapted—not that I was going to do it, but that it was adapted for that purpose, and being so was worth that amount of money. I know, more or less, how active the market for Coronado lots is or has been since August, 1917. It has not been active. In making my estimate
106 of seven millions as the market value of the land I did not take into consideration at all what this land was assessed for by the county assessor or the city assessor. I did not know what that land was assessed for and has been for four or five years. I never inquired. That will apply equally to the tide lands. I don't know what they were assessed at. This sketch, Exhibit E, is a sketch made under my direction of North Island. It shows 754 acres in light green or light blue here—478.86 acres in light green or olive in the center. The surrounding piece I take to be the more valuable. As to the water front, the one on the ocean and the one on the bay, I made that sketch to show that; and in comparing it with the Coronado valuations, or what has been sold in Coronado, probably the stretch on the ocean is the more valuable; but I haven't any doubt that in this particular instance, where North Island is concerned, that the land all about the island, both fronting on the bay, on Spanish Bight, and on the ocean, would be about equally valuable. In Coronado, I will have to explain, the Beach Company has reserved that portion of the island that is contiguous to Spanish Bight and to the bay, and the residences do not go down to the water in any instances. That being the case, it would not be very hard, I imagine, for industries to get into that portion that is reserved, if they paid the price for it, and thereby depreciate the value of the rest of the island. So lots facing on that part that is reserved do not find such a ready sale; they are not so valuable. In estimating as an average $5,000 an acre for this land marked 40.66 acres I did not take into consideration that there might be wharves and warehouses fronting on that. That probably would make a difference in my valuation of the lands that are along those tide lands. In my estimate I gave a thousand dollars per acre value to the tide lands, the submerged lands, and also to some lower lands in—well about

207 acres of lower land than the mesa land, making about 809
107 acres in all; I gave those a value of about a thousand dollars an acre, as being tributary or contributing a certain class of improvement to the land itself. Now, if you take out—if you put factories and wharves along the north side of the island, up in the section that you say, the chances are that it would take away from the value of the other portion of the island. But if you devote that to business and commercial purposes and railway terminals and the like, it will add, or should add, considerable to the value of more than a thousand dollars which I am giving to the tide lands. It might reduce some the residence value of $5,000 an acre. The subdivision of 40 acres that I made myself was out in East San Diego, four or five miles from the city proper. It was just small stuff, nothing prominent. It was sold very quickly, within a few months. It was not comparable to this at all.

Redirect examination by Mr. DUNNE:

I have been in the city of Portland, and know that the Willamette River flows through Portland. Portland is upon one side and Portland is upon the other. If the population of San Diego should increase 100,000 in the next five years we would not have a bit of trouble about our water. This is the part of North Island nearest San Diego, and faces on the deepest water in the bay. No dredging whatever would have to be done in order to land a ferryboat or any other kind of a ship at that particular point, except possibly the building of an apron wharf, such as Mr. Holmes told us about here. As a matter of fact I was standing on the island at about one of these points the other day, and one of our biggest warships came by, going south, and I really believe if I had had a stone I could have thrown one on
108 its deck, it was so close. The old shipways used to be here, and they used to haul ships out of the water over there. I fished from the end there, and in throwing out my line, or dropping the line off my pole, the boat might be carried with the tide a little bit further out, and where it might be six feet here, it might be thirty or forty feet, ten feet away. It is very precipitous there, and it would require no dredging or anything else to get a ferry there. That isthmus between North Island and South Island certainly is available for land transit between the sister islands. I can't say that I do know whether it has been hitherto the policy of the Coronado Beach Company not to sell their property.

GEORGE BURNHAM, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

I have lived in San Diego about 17 years. In the first instance after I settled in San Diego, my business was the real estate business. Part of that time, seven years, I lived in National City, but did business in San Diego. During this period I have conducted my business in what we have been calling the city of San Diego. I was engaged in the real estate business in San Diego about 14 years. When I came

here in 1903, I associated myself in business with C. A. Scott, who had an established business here, real estate business, and had been in business here for some 21 years, and we did business under the
109 name of Scott-Burnham Investment Company. Mr. Scott retired, I think, from business, in something like four or five years after we had been together, and I continued the business until the fall of 1911, and then became associated and identified with the San Diego Securities Company, as vice president; and was connected with that company as its vice president until within the last six months. The San Diego Securities Company during those years was engaged in the business of buying and selling and developing real estate. Since I went into the San Diego Securities Company I have formed a new business association, as vice president of the Southern Trust and Commerce Bank. I am familiar and was in 1917 with real estate values in the bay district of San Diego. I know North Island. As of August 1st, 1917, that property could have been used for more than one purpose. I should say for residential purposes or commercial purposes, and as a matter of fact it has been utilized for an aviation field. It had and has, I think, various uses and adaptability. Its residential adaptability, as of August 1st, 1917, was as a high-class residence subdivision. It would have appealed to those looking for desirable home sites, people who could afford to pay a good price for something that they wanted, something that would appeal to them. It has an individuality that you do not find in many pieces of property. It is so situated as to be almost surrounded by water. You have the advantage of the ocean front and also of the still water. The climatic conditions are ideal. It has a beautiful outlook, part of it fronting on to Point Loma, on to the channel and the bay. Every vessel sailing the harbor has to pass it, which adds interest and is an attraction. Another part faces Coronado South Island. The soil is good and it lies well. I don't know of any hardpan or stone or rock over there. I believe it would lend itself
110 splendidly for landscaping in connection with a high-class restricted residential subdivision. Indeed, I do consider the factor of a unitary and intact ownership an element in the residential adaptability and suitability of that property. I think it has great value, for the reason that the acreage or the area is sufficiently large so that if subdivided for residential purposes, villa sites, adequate building restrictions could be maintained and the property and the homes protected so that no undesirable buildings or industries could encroach upon them. I think the 663 acres of tidelands off the northwest shore are adaptable as entering into the residential availability of the tract. One reason is that it insures to the residents here and the property owners fronting the water access to the water, and the fact that no industries could be built in front of them. I heard the testimony a little while ago of Mr. Masten, and also of Mr. Holmes, and I have often—I have at times expressed the same ideas, even years ago, that a beautiful aquatic park could be developed and maintained there, and also, that even a Venetian village effect could be worked

out there splendidly, making beautiful homesites on small islands, which could easily be thrown up. We have so much of that Dutch Flats over there across the bay from North Island, which lies beyond the bulkhead lines as established by the Government, and also the middle ground, which will be removed from our channels some day. I am told there is more than sufficient material to fill the submerged lands lying back of the bulkhead line, and that that dredged material will possibly have to be carted out to sea unless some place can be found for depositing it. Now, that would work out, in my mind, in building up these islands, either for club houses or hotel sites or for villa sites. That is a possibility. In speaking of the
111 adaptability of the tidelands from that point of view, I am excluding their commercial application. I think those tidelands are capable of commercial use; not in connection with North Island as a residential proposition, because I think one would kill the other; that is, I don't think they would work in conjunction. I believe North Island can be developed as a residential proposition, or I think it could be developed as an industrial and commercial place, terminals, marine terminals, railroad terminals, and industrial sites, but not in connection with the residential possibilities. The application of the tidelands to commercial purposes would detract, in my judgment, from the character of the residential territory. I think the tidelands could be utilized splendidly for boating, swimming, bathing, and many uses of that kind. In August, 1917, much of the water front of San Diego itself had been appropriated. I made an estimate of the fair market value of North Island, as of August 1st, 1917, in view of all the adaptabilities to which, in my judgment, it could be put, of $7,884,639.

Cross-examination by Mr. DENIS:

In making up that figure I took that from sales that I was famiar with. I understand there are 1,233 acres, approximately, of mesa land on North Island, and I figure that at $4,789 per acre, which gave me $5,904,837. The balance is not all tideland, Mr. Denis. Some of it is marsh land, for instance, the Spanish Bight and Whalers Bight, and so on, would be, I suppose, called marsh land. You can walk on it. But, including the marsh lands and tidelands and submerged lands, I think there are about 909 acres, and I estimated that at five cents per square foot, which would be at the rate of $2,178
112 per acre, taking it as a whole. That gave me $1,979,802, or a total of $7,884,639. The exact figures on the 1,200 acres are $5,904,837. I would not give a valuation of five cents a square foot for the lands between low and high-water mark, the same as lands entirely submerged by water. That could be subdivided more than I have subdivided this 909 acres. I took the submerged lands and the marsh lands and the tidelands as a whole and gave a value to the three different kinds of lands. Some of it would be worth more money than five cents a square foot. If I were segregating it I would put the price more on the marsh lands than that. None of

it considerably less than five cents a square foot. As a matter of fact I would not put it at less than five cents a square foot, even though I was segregating it. I never heard what these tidelands were assessed for by the State and county authorities; nor what the upland, or the 1,200 acres, were assessed for by the State and county authorities. I was not interested in that when I was making up my appraisement. I don't think that South Island has all been disposed of and gone into other ownership than that of the original owner. In fact I know it has not. I don't know exactly how much of it is still in the original ownership. I have subdivided three or four or five tracts. The largest area of those subdivisions was 200 acres. The names of the tracts are: Loma Portal No. 1, Loma Portal No. 2, Point Loma Villas, Olive Wood Terrace, fifty or sixty acres in that; eighty acres in Point Loma Villas. I would say in Loma Portal Nos. 1 and 2, they join, practically one tract, possibly sixty or seventy acres, for the two; I think about that. Now, this other tract of 200 acres, while we have worked on the subdivision, on the scheme, on the plan, I will say, of subdivision; the plat has not been offered yet for the approval of the authorities. That is not a subdivision that has been put on the market. Point Loma
113 Villas as a whole has not been put on the market; in fact, it has not been completed. While the plat has been filed and some improvements made on one end of it, it has not been completed, and has not been placed on the market generally. A few pieces have been sold out of it. For instance, Mr. Bridges, before we had scarcely any improvements, while the sage brush was still on it, bought, I think—well, it was a villa lot. I have forgotten how many acres. I could tell by some maps here; I could figure it; and I think he paid at that time—possibly 20 lots were put on the market for sale. The Loma Portal tract was put on the market in 1912 and 1913. All of No. 1 has been disposed of. There may possibly be one or two lots left in it, but I think all of No. 1 was sold out; and No. 2 was placed on the market, I think, in 1913; it may have been the latter part of 1912 or the early part of 1913. That has not all been sold. The depression came on about that time and the real estate market became rather inactive. Possibly a third of that was sold at prices, however, higher than No. 1. The real-estate market in 1917, due among other things to the war, was very quiet. I think the market shows a slight improvement, possibly a slight improvement now, which commenced within the last six months. There is not room enough to build up islands and canals for Venetian villas inside of the bulkhead line. Therefore, if that plan were carried out, it would have to be carried out between the pierhead line and the line of high-water mark. I know the pierhead line—it is supposed you can not build any solid structures between the pierhead line and the bulkhead line, although those plans have been modified by the Government engineers at various times. I took into consideration, in the subdivision plan, the necessity for the improvement of the property for a high-class residential subdivision, such

114 as streets, sewers, water, lights. I know about what it would cost per square foot. I wasn't figuring on the cost of developing it. I was merely figuring on the basic value of it. I can give you an estimate of what it would cost us to develop Loma Portal for instance. That is, I suppose, one of the best-developed tracts in San Diego. While we did not put in concrete or bithulitic pavement, we put in pavement there which cost, I think, pretty near as much, to the depth of six inches. We put in concrete walks, curbs, and gutters. We put in sewers, water, gas, ornamental shade trees, ornamental lamp posts, carrying 220 watts at every street intersection, and leveled the lots in nice shape, ready for building. And that averaged $7 per front foot, or, on the basis of lots, 50 by 100, about seven cents per square foot. Where lots are 50 by 100 feet deep the cost per square foot is about 5 cents. Where the lots are 50 by 100 feet deep the cost is seven cents per square foot. Now, if the lots were large villa lots or villa sites, the cost would be relatively less than five cents per square foot. It is safe to figure five cents per square foot. Not only did we install those facilities, but we carried the laterals from the sewer, from the water, from the gas mains to the property line of every lot; and that was a total cost of $350 per lot, or seven dollars per front foot, or the figures per square foot as I have given you. In my direct examination I don't think I was asked as to the value of the tidelands for commercial or residential purposes. I based my estimate of one million nine hundred thousand dollars for the tidelands on my knowledge of sales, and what property is sold for around San Diego Bay, and prices asked for property, and also the knowledge of others. I will say that in my judgment those tidelands, submerged lands, marsh lands, and meadow lands are worth the figure I placed on them, either in con-

115 nection with a residential subdivision of North Island or as a Marine terminal, commercial. I know of the leases made by the city of San Diego to various enterprises only as a citizen. I do not know the actual number of such leases made by either the State or its successor in interest, the city. I know the rentals vary. I recall having secured a franchise at one time for a wharf, for a small pleasure pier, for which we paid five dollars a month, just nominal rental. There were some leases made by the city many years ago, for instance the lease made to the Pacific Steamship Company, and there may be many—I could name many leases, I suppose, the majority of them, but I can't tell you what they pay.

Redirect examination by Mr. DUNNE:

I think that the price of five cents per square foot for those tidelands would be a very reasonable one, for commercial purposes, because I know of property having been sold at more than that. I think they have a potential value for strictly commercial purposes in contradistinction from residential purposes of up to thirty cents a square foot. That would be approximately twelve or thirteen thousand dollars an acre. By potential value I mean the develop-

ment of them, and of the cost—I know of lands that have been reclaimed and filled at a cost of thirteen cents per cubic yard that would be—it depends upon the depth of the fill. It would run anywhere from a thousand—about a thousand dollars per acre, a thousand or fifteen hundred dollars per acre. I think in the present condition of those lands that five cents per square foot would be a very low estimate. I base that upon actual sales made; and in
116 making that estimate I have in mind the commercial adaptabilities of the tideland property.

FORD A. CARPENTER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

My business or profession is that of consulting meteorologist, which means weather man. I have been a meteorologist for a little over 32 years. I was in the service of the United States Government as a meteorologist from February 2, 1888, until September 15, 1919. I was observer at Portland, Oregon; at Port Cambee, Washington; chief clerk of the Weather Bureau office in San Francisco; official in charge of the Weather Bureau station at Carson City, and State weather service director for six years; official in charge of the Weather Bureau office in San Diego for 16 years, or from March 30, 1896, until June 30, 1912; and from July 1, 1912, until my separation from the service on September 15, 1919, official in charge of the Weather Bureau station in Los Angeles.

Q. Now, I will ask you, Doctor, having in mind the residential adaptabilities of the San Diego Bay region, how is the climate of San Diego related to that subject matter?

Mr. DENIS. That is objected to as being incompetent, irrelevant, and immaterial, not meeting one of the issues of this case. I can't understand that this witness is qualified to apply the most beautiful climate that I know of anywhere, which this is, to real estate values, unless he is going to further develop that he is in the real estate business, and can testify to direct connection in values between
117 a perfect climate and the real estate market. I do not think that it is competent evidence, your honor.

The COURT. I will overrule the objection. He means by that how it affects the country, whether it makes it a good or a bad residential property.

The WITNESS. My reply would be this: That there are few districts in the United States, if not in the world, with the climate as superior for residential purposes as that of San Diego. First, the characteristic of the climate is its freedom from storm conditions, owing to the fact of its being far south of the storm tracks; second, its equability, that is to say, freedom from high temperatures or low temperatures, by the presence of the great body of water to the west, and its maximum amount of sunshine, owing to its being to the south and free from the influences of the storms aforementioned. I know North Island in San Diego Bay. My observations of the

weather conditions of North Island are based upon observations as a resident for 16 years, several visits there, and the application of the official data at the Weather Bureau station at San Diego to that district. A very important condition to which North Island is related is the fact that it is surrounded by water, having a temperature that varies probably less than twenty degrees in the year; and second, the protecting arm of Point Loma, which shields it from the winds from the northwest and west and north. It is less windy than probably other districts in the San Diego Bay region that I am familiar with, and it is less foggy than portions of San Diego City and portions of Coronado south of Glorietta Bay. The aforesaid Point Loma would act to a very great degree in protecting it against fog in the prevailing northwesterly winds—the moisture-bearing winds would be deflected upward, and much of the fog would be condensed along the surface of Point Loma. You
118 notice that when you see Point Loma covered with fog other sections are comparatively free from it. We have a very excellent example in the fact that the base or the sea level, rather, district, within the vicinity of Point Loma is freer from fog than the point itself in the change of location of the lighthouse from the summit of Point Loma, known as the old Spanish Light, to that of the sea level. They had to remove the light, although it was a very much better location as far as visibility was concerned, at four or five hundred feet above the sea, than at the sea level; but owing to the fog conditions the lighthouse was lowered to the sea level or nearly so. So far as the humidity is concerned, it would be greater on North Island and in Coronado than in the residential portion of San Diego, because of its elevation and near sea level, and the fact of its being closer to the sea. There would be less variation in the humidity. For example, on Florence Heights, where I lived for 15 or 16 years, the humidity there would be less than on North Island or Coronado, and there would be a greater range in the humidity. That is, there would be several hours during the night—I am speaking now of the residential district of San Diego—when the humidity was high, but there would be a corresponding period, and probably a longer period, when the humidity was comparatively low, whereas on North Island the relative humidity would be continuously moderately high. I can indicate the characteristic temperature of North Island or the temperature range only by inference. Probably having a maximum number of hours between 40 and 80. There is not a climatic subjection to such extremes above 80 and drop below 40 in this region. It is freer in that respect. It is my memory—and it could be easily verified by our records upstairs—that San Diego has
119 less than one hour of temperature on an average in the course of a year above 80. A temperature below 40 is very infrequent. I think that up to 1912 there were four times that the temperature dropped below freezing; and in 1913, the year of the great freeze, the temperature dropped to, I think, 25. I would not call the climate of the San Diego Bay region a mild climate in the sense

of being an enervating climate. I would consider that San Diego was a splendid climate for healthy people, but not a climate for a sanitarium. It is a place for live men and women to live in.

GEORGE L. BARNEY, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

I have lived in San Diego since 1906, and my business has been general real estate business, and some subdivision business. I was never in the real estate business anywhere else than here. I have carried on the real estate business in San Diego about 12 years. At first we had an incorporated company; afterwards it was a partnership. Mr. McKie, Mr. Kettner, and Mr. Wetzell were in the incorporated company; the name of the firm now is Barney & McKie. I am still engaged in the real estate business as a member of that firm. I am familiar with real estate values in the San Diego Bay region. I know North Island. I have known that property ever since I have lived in San Diego. North Island was adaptable for residential purposes, in my judgment, as of August 1, 1917. It could have been used for both residences and commercial purposes. I think it is the most uniquely located piece of land in one body that I know of
120 for a high class residence section. It is surrounded by water, practically, and its close proximity to Point Loma protects it from the winds. It lies high and dry. It is practically level, and it is within a reasonable distance of the business section of San Diego. I think the tide lands would be quite a feature in connection with the residential section, providing they were given over for the use of the residents of North Island. They could be used for private piers or community piers, or it could be used for harborage, or it could be used for anything where a water front is used. I am not familiar with municipal institutions sometimes called water parks or aquatic parks. I think the tidal waters are adaptable to use as a pleasure ground upon water. This property was available as of August 1, 1917, as it is to-day, for wharves and for drydocks, for manufacturing, for railway terminals, for any business in connection with a bay, as pertaining to shipping. Quite a portion of the water front of the city of San Diego, as of 1917, had been leased by the city for different purposes. Some of those holdings were large and some of them were smaller. I have seen the United States Government map that was exhibited here this morning. I think the colorings there upon the water front represent the water front holdings in private ownership, exclusive of the United States holdings and municipal pier. In my judgment, as of August 1, 1917, the singleness and intactness of ownership of this entire tract did enter into its value as a whole, because it could be developed along any line for residence purposes. At the present time, or at no time, has there been any really restricted residence district in San Diego. In all portions of the city you can build anything you want to build—garages or blacksmith shops or grocery stores, and the possibilities of North Island for an exclusive residence

district is the fact that it is one ownership, and could be re-
121 stricted absolutely for that purpose. If North Island is used for commercial and residence purposes, I would value the tidelands at $4,000 an acre, comparatively. In view of all the adaptabilities to which North Island can be put, and as of the 1st of August, 1917, in my judgment, the fair value of that tract as a whole, my valuation, would be $6,947,865.

Cross-examination by Mr. DENIS:

In giving a valuation of $4,000 an acre for the tidelands I assume that the owner could sell, could own and sell that land or use it himself. The rental value would be absolutely under the domination of the ownership.

Q. Assume, for the purpose of this question, that under the law of California tidelands can not be owned in private ownership. Assume that to be the law. Would you then say that the value of those tidelands in California was $4,000 an acre?

Mr. DUNNE. One moment. I object to the question as without foundation and as assuming matter which is incompetent, to wit, that under the law of California tidelands are not susceptible of being held in private ownership.

The COURT. I think, Mr. Denis, the objection will have to be sustained.

Mr. DENIS. Q. Well, assuming that the tidelands connected with North Island were subject to the restrictions that all tidelands are subjected to under the law of California, will you still say that the value of those tidelands subject to those restrictions was $4,000 an acre?

A. I arrived at my valuation by comparison with tideland sales that I know that have been made on the Bay of San Diego.

Mr. DENIS. I move that that answer be stricken out, and
122 that the witness be required to answer the question.

The COURT. The answer will be stricken out; the question calls for a yes or no answer.

Mr. DUNNE. One moment. I have two objections to that question: First, that it is incompetent and without foundation, because it assumes an attribution and a limitation in respect to these tidelands, which is not justified. I object to it, in the second place, because it calls upon this witness to pronounce, before he can answer the question, upon the legal limitations and restrictions upon tideland ownership.

The COURT. There are many questions involved as to what the rights of riparian owners are in tidelands, and depending upon lots of facts and circumstances. I think the question calls for so many phases of the proposition that it would be useless to ask the witness's opinion about it. The law in relation to the right to flood this particular land might be stated to the witness, or the right to occupy it, if held in private ownership, and then call for his opinion, or the law might be stated relative to these subaqueous lands, if it is held in

private ownership by the Coronado Beach Company, might be stated and the witness's opinion secured; but without stating that law we don't know what the witness may have in mind concerning the right to wharf out, or the right to reclaim, or anything else.

The WITNESS. The tidelands to which I have given a value of $4,000 are immediately in front of the bay there [pointing to map]. I put three values, from $2,000 to $4,000, on the tidelands, as its importance to me seemed fair and equable. I estimated the lands up there next to Port Pio Pico at $2,000 an acre [indicating on map]. This I put in at less value, this section next less, and I put this at $4,000 an acre, in my opinion. I appraised 93 acres in the neighborhood of Whalers Bight at $2,000 an acre—no, it was 94.45
123 acres. I appraised 122.83 acres at $3,000 per acre. That is immediately adjoining the Whalers Bight section in here [indicating], up to this section right here [pointing to the apex of that side of the survey line]. Where these tidelands extend out into the channel, making, on that map there [indicating], the entrance to this inner section here, and containing 122-odd acres. And the remainder, 436.50 acres, at $4,000. The total valuation I put upon the 663 and a fraction acres is $2,303,390. The total aggregate of my appraisement for upland—the land above the high-water mark—is $4,315,255. That is $3,500 an acre for 1,232.92 acres. This is in combination of the use of North Island for both commercial and residence purposes. My valuation of that upland, or mesa land, would be higher than that if we removed the commercial development of the water front. I think it takes from the value of the residence section, from the uplands, by having a commercial front there. My subdivision experience has all been by associations, not myself individually. We have put on six or seven subdivisions, some out in East San Diego and some on Point Loma. The extent of the aggregate of the subdivisions that I conducted in acres is about 250 or 300 acres. I helped to lay it out; helped devise the way of laying it out; helped price it; and helped decide on the improvements. In my figuring I did not especially consider that Coronado was a subdivision of improved property. I knew Coronado, as such, was somewhere in the vicinity of 600 acres or thereabouts. I knew it had been subdivided more than thirty years ago. I don't know that approximately 40 per cent of that subdivision is still in the ownership of the Coronado Beach Company; I know it still has holdings there; I don't know to what extent. I know there is property for sale in Coronado, the same as in San Diego. I couldn't tell you whether there has been much or
124 little selling of Coronado lots up to this time from August 1, 1917. The upland of North Island would, of course, have to be divided up into building sites to be available at the price I put upon it of $3,500 an acre. Before we put a selling price on North Island for a subdivision we would have to go into all of the different expenses and costs relative to the island before we could reasonably

hope to market it, and that would be the basis of the selling price. In making the estimate that I have testified to here I did not go into all of the expenses necessary to subdivide this property and put it on the market. I did not consider the question of the water supply to furnish the 1,200-acre tract with water, because I think there is no question but what they could get water from San Diego. I know the approximate use of water *use of water* in San Diego to-day, also the approximate reserve we have in storage for San Diego. I considered in that estimate that this body of land is twice as large as the subdivision of Coronado, so called. I did not consider at all that there was a portion of the subdivision of Coronado still unsold after thirty years of its being on the market. I did not consider the cost of sewers, lights, streets, and other necessary improvements for a high-class subdivision, because all of that would come in after we had fixed the approximate selling price, as to how much of an investment we would want to put in other than the purchase of the land. I did not consider the cost of sewers, the cost of lights, the cost of streets, the cost of planting trees and vegetation and lawns; I did not consider any of those things, because I got at it in this way: Taking the best of the residence section of San Diego, which has no restrictions, based on the selling price of lots in that district—no matter what price we would put on the lots in North Island, as compared with the selling prices in the better districts of San Diego, it would be perfectly safe on account of the environ-
125 ments and improvements. Therefore my estimate does not include the prospective price, absolutely not, because I know that price is low as to what it could be subdivided and sold for; that is, in my judgment. The largest body of land that I have been instrumental or an agent in the purchase of for high-class residence purposes is about 20 acres at Point Loma. I can not name any sale during the period of my residence in San Diego of a body of land of twelve hundred and odd acres at $3,500 an acre. In arriving at the value of seven million dollars, approximately, I did not consider at all the length of time it would take the purchaser to dispose of that body of land. That would depend, of course, upon the ability of the seller, of the selling agency, and how they went at it, and who they submitted it to. I did not fix in my mind how many years it would take to do the work of improvement and put the lots on the market and dispose of them. I didn't go into it that far. I would estimate that the gradual increase of the value of the property would take care of the increased cost by reason of the interest charge. There should not be any question of purchasers within a reasonable time for that entire body of land. There is nothing like it that I know of for sale.

Redirect examination by Mr. DUNNE:

I did not know about the 600 acres in Coronado some 30 years ago—that they sold for $2,800,000, or that part of it sold for that. I am not familiar with that.

126 JOHN D. SPRECKELS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

I have lived in San Diego on and off for a period of thirty-three years. It was not a continuous residence, however. During that time I have been engaged in business in San Diego. I know the property, North Island, very well. I am familiar with real estate values and tideland values in the bay district of San Diego. I am the president of the Coronado Beach Company, the defendant in this case. North Island is adaptable to a great many purposes. The property is adaptable for residential purposes on account of the location, being surrounded by the ocean and the bay, and from the climatic conditions prevailing there, and the protection afforded by the high lands at Point Loma. The climatic conditions are more favorable in North Island than in the South Island, on account of its closer proximity to the headlands of Point Loma. North Island can be adapted for any purposes, as far as residential purposes go; for all classes of residences. In a community you have to have all sorts of residences, for the poor, for the artizans, for the storekeepers, and then also for the men in better circumstances, who want villa lots instead of small lots. That land is adapted in every way for villa lots or villa sites. They would be placed wherever the people desired to locate. Some prefer the ocean side, and some want to get away from the ocean. North Island is equally as accessible to San Diego as South Island, excepting probably you could reach the residences in a little less time, probably not to exceed five minutes.

127 North Island is adaptable to access to South Island in two ways. One is by the strand connecting the North and South Islands on the ocean side, and then by causeway or bridge across Spanish Bight, and that was contemplated in the plans that I have evolved for the island. That strand has been used for both land transit and rail transit. They operated a railroad across that strand when we supplied the rock from Sweetwater for the jetty now projecting 1,200 feet out seaward from the point of North Island. I am familiar with the 663.3 acres of tidelands on the northwesterly coast that you have been speaking of here. They are commercially adaptable by dredging out, dredging out the shoal-water part of the island, the title running out to ship channel to deep water. That could be dredged and the waters established in there, and then it would not be subject to the tolls and wharfages as levied by the State for wharves. That property is practically a railroad terminal now. I refer to the San Diego & Arizona, which operates to Yuma, and it connects with the Southern Pacific to El Paso, and from El Paso by Rock Island and El Paso Southwestern to Chicago. The road—the San Diego & Arizona Railroad—was not completed and started operating until the 1st of December, 1917. On the 1st of August, 1917, the road had been completed to some point beyond Campo. I think

possibly up to as far as High Pass. It was on the 1st of August, 1917, in course of construction towards its completion between termini. The unity and intactness of ownership, in my judgment, of North Island as a whole, most decidedly enters as a factor in the value of the property; from the fact that I had numerous offers from eastern people——

Mr. DUNNE. Q. Now, I will ask you in view of all the adaptabilities to which that property could be put, as of the first of August, 1917, what, in your judgment, was its fair market value as a whole upon that date?

A. I valued the land between seven and eight million dollars.

128 Cross-examination by Mr. LAWSON:

I think it was in 1888, that I became indentified with the Coronado project. I have been identified with that project ever since that time, and the one most vitally interested in it financially. I first noticed and appreciated the superior climatic conditions on North Island with reference to South Island shortly after my arrival here in 1887. I have always been aware of the fact that the climatic conditions on North Island are better than the climatic conditions surrounding South Island. I always considered North Island as the cream of my investment in San Diego, and the most valuable. With reference to 1888 and the 1st of August, 1917, considerable money has been invested in Coronado Beach, in the way of improvements and so forth. When I became identified with the Coronado Beach Company it began to prosper. I was the man behind it. I am the man who was responsible for its development. I was the man who saw that the finances were there to develop it; except that I did not do much developing in North Island at that time. Most of the month that went in was my money—not alone my money expended in the development of Coronado and South Island, but also largely in San Diego, because one would reflect upon the values of the other. And for that reason I engaged in the development of San Diego, and especially in the building of the San Diego & Arizona Road. I could figure out and visualize what that meant to San Diego and meant to Coronado. Up to August 1, 1917, I hadn't done anything at all towards developing North Island, excepting I had it surveyed, staked out, and platted for residences. That was done several years ago—before 1917. I planted trees there, getting it ready to put on the market. Nothing else was done towards developing North Island besides what I have just mentioned.

129 Up to August 1, 1917, it wasn't the time for me to develop North Island. I had to wait on other things—on other matters. I did not think in the beginning to do otherwise than to dispose of North Island for residential purposes, but when I saw and learned by reading the papers, and the action that was taken here in regard to city-front property, which is almost taken up—75 per cent of it—I realized that it was one of the mistakes that was made here, because the time was coming when we would want big

enterprises here and we have got no place to put them. North Island can be made a good railroad terminal. A railroad terminal on North Island would develop the trade at this port here, and that trade is going to continue developing right along. I look for a big trade here on account of its proximity to the Panama Canal. The ships are coming here and the freight which ordinarily, and which in the past has come all the way from the East to the West, will now come through the Panama Canal on account of its cheaper operation of ships and railroads, and will land its freight in this port, and then will be shipped eastward to points where it meets competing rates from the East; and we figured we can go as far East as up to the western end of Texas; and then there are other reasons. We have a large valley right close at hand—one of the most productive valleys in the world. The shipping of products, especially cotton, will take place and go to the Orient—not alone the cotton from Imperial, but from Texas. Shipments of cotton have been made many years ago from New Orleans here, and then by ship went to China and Japan. Those reasons all apply equally to the entire San Diego Basin or harbor. Those same reasons would apply to San Diego proper, as well as to North Island, but for the reasons that I have stated before, there is so much of the water front that has been let out in small parcels, and the Government has taken a large area, that you have not got room enough to put the ships that
130 are likely to come into this port. I predicate the reason for selecting North Island solely then upon the necessity, that is, the lack of accommodations on the San Diego side. The advantages at North Island are that it has got location, and things can be built—wharves can be built—where you could not put them in San Diego, for the reasons that I have stated, that so much of the water front has been already consumed. I think about 75 per cent of the water front is gone on the San Diego side. I merely predicate that upon necessity; that is, the lack of accommodations in San Diego; there would be that necessity arise. I won't admit that in the handling of freight there would be a disadvantage on the North Island side rather than on the San Diego side. There will be no difference in the handling of it. I appreciate the fact that every time a piece of freight is handled it adds to the expense; but there will be no additional expense because car and ship will meet there together, and it is simply taking it out of the ship and putting it on the car and sending the car on its way, so there will be no additional handling; handling in such manner as that proposed in using modern methods in handling freight, as against the methods that are in vogue here in San Diego. I can handle it cheaper than they put it on this side. I do not limit the commercial purposes of North Island solely to that of distribution. It is capable of a good many other things. A place where trains and boats meet and exchange commodities and go their separate ways; that is one thing. You can have dry docks in there, you can have ship yards, you can have factory sites, and warehouses, and taking the freight from the ships right into the

storehouses. In fact it can be made a free port. I contemplate only one portion of the island being devoted to industrial purposes. I think that the island could appeal to those seeking a high-class residence, and at the same time foster all those various and numer-

131 our commercial projects that I have mentioned. I do not think one would destroy the other at all. That I know from my experience in San Francisco. I lived in one of the residence districts in San Francisco, on Pacific Avenue, one of the principal residence districts in the city of San Francisco. On account of its view of the bay and of the harbor it lends itself to residences. Below that we have factories there, and it has not interfered with the growth of San Francisco or the development of that street. And that not alone applies to Pacific Avenue but also to Broadway and Vallejo Streets. And I think that, within that comparatively limited area, the island could harbor both these various industries and other commercial projects and I have mentioned, and also high-class residences. It is contemplated to put those on the submerged lands—the harbor. and have an inner harbor—a harbor within a harbor, so to speak. When I arrived at the opinion that I have just expressed, as to the value of North Island, I did not at that time, and do not now, know the assessed value of North Island. I have known, but I have forgotten. I have people who look after those things. I have a man who does nothing but look after the taxes. I did not have any idea as to the assessed valuation when I arrived at my opinion. I would not want to make a statement that I can not verify. Naturally, I was interested in the case and talked with the experts who were going to testify. I didn't discuss the question you just put to me in regard to the amount of taxes paid on the assessed valuation of it. I have not discussed all the other phases in reference to this case, particularly—I may have mentioned—the most I have heard is what was produced in court here.

132 PAUL I. WELLES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

My business, or profession, is expert land appraiser. I was educated at Yale College. I am a graduate of Yale University. The first part of my business life was connected with the railway service in various parts of the country. For seven years I was with the Union Pacific and Great Northern, in charge of construction and operation work, where we had a good deal of railway terminal experience. I followed that by two years as superintendent of the Long Island Railway, and around New York Harbor, where we had to do with the beach business, Rockaway Beach and Coney Island and Manhattan, and with the various freight facilities at Brooklyn Long Island terminals and Manhattan terminals. And then for nine years I was in the Southern States, the South Atlantic States, in charge of the Southern Railway, in South Carolina, North Carolina, Georgia, and Florida, where I was manager of the terminals

at Jacksonville, Florida; at Savannah, Georgia; and at Augusta, which is a port on the Savannah River; and there became acquainted with southern conditions both as to freight terminals and water fronts and the various beaches along the south Atlantic. After that I went into the general contracting business, what we call heavy contracting, railway construction, and the like; and with the Erie Railway; had a very intimate knowledge of conditions in Jersey, Hackensack Meadows, and Newark, the development there of the tidelands into their completed and improved condition. And then I went into contracting for the Government of the United States on breakwater work. I built a part of the breakwater off the city of Cleveland, and while there we got our rock from Johnson
133 Island, off Sandusky, about 75 miles distant, and had a fleet of boats, and I had to do with the lake ports Lorain, Cleveland, Buffalo, and Sandusky. I also built a portion of the United States breakwater off Rockport, Massachusetts, and had to do somewhat with Boston Harbor, particularly Gloucester Harbor. Then I came into California and did some work for the State of California and for the city of San Francisco—a good deal for the city of San Francisco and for other municipalities, and for railways—conduits, railroad tunnels, trestles, pretty much everything that comes into the experience of a general contractor. And in that capacity I acquired a very fair knowledge of water-front conditions of all kinds in San Francisco Bay. Then I went to the Southern Pacific Railway Company, or the Southern Pacific Company, in the valuation department, as chief land appraiser, and for seven years had charge of the appraisal of all of their lands from El Paso to Portland, and from San Francisco to Ogden. This was a work performed in connection and cooperation with the valuation bureau of the Interstate Commerce Commission, in their Federal valuation of railways; and we pursued the same lines of development and the same methods of valuing and appraising lands, which, briefly, was to determine the value of similar adjoining, adjacent lands, privately owned or otherwise, than by the carrier in question, and reflect that value, making allowance for changed conditions to the best of our judgment. In the course of my work as an appraiser and in collaboration with the Interstate Commerce Commission I became acquainted with the value of tidal lands up and down the Pacific coast at various ports, including the port of San Diego. That was a part of our business—Portland, the northern ports, San Francisco Bay, San Pedro, and Long Beach, Santa Barbara, Santa Cruz, Monterey, and we had some property here that I had to look after also. I am familiar
134 with real estate values and tideland values at the ports on the Pacific coast, including San Diego; that was my sole business for seven years. I am familiar with North Island. On August 1, 1917, it was adaptable to both residential and commercial uses. There are many reasons that make it particularly suited for residential purposes. The first one that is evident to us all is climate

conditions. It is sheltered by the promontory of Point Loma from the prevailing winds and fogs. The fact that it has a water front of nearly the entire distance around it, of six and a half miles, of which a portion is on the ocean, with as good a beach, perhaps, as there is to be found on the Pacific Ocean. The fact that the property, at least 60 per cent of it, may be termed marine-site property, as distinguished from interior, so that a man would say he was living on the ocean or the beach front, the bay front. A large part of it is suited for very high-class homes, perhaps the highest of any to be found in the land. The fact that it is on this harbor, which for residential purposes, has no equal on the Pacific coast, with its sheltered condition and its climate. The fact that it has a population of nearly 100,000 people around it; that it is neighbor to the present town of Coronado and to San Diego, and is a borough of the whole district, you might say, the same as Brooklyn is a borough of New York—of Greater New York. It really is not distinguishable from these other portions of the bay in respect to population. Take Berkeley and Oakland; they run together; you can't tell the difference unless you have a map; and there is a mere separation by a strand of North Island from Coronado. It being under one ownership, it is susceptible and is adapted to very modern development; it lends itself to a high-class of restriction. I was at Los Angeles Sunday, and we drove through the restricted districts, and some that were not restricted, and the difference is marvelous, what restriction will do in enhancing the value of property. Without
135 restrictions you do not know who your neighbors are going to be, and you don't know what you are going to have, whether African or coolie. It topographically has a gentle slope from near the center to the water front, which is sufficient for storm drainage. The character of the soil is such that it is easily put into landscape and garden effects, or it has a good foundation for structures, being a sort of a sandy loam, partly alluvial deposit and partly from the sea. Its shape is such that there is practically no waste. I don't think in the whole development I found more than something like 15 acres of waste project that I had to throw away in analyzing the land as it is to-day. In respect to its adaptability for residential purposes, the tidal lands have a relation from that point of view. I concur with the views I have heard expressed here by other witnesses, some of them local people, that if the island and the tidal lands are put to two uses, or more than one use, undoubtedly we will not get as an average of value for the residential portion per acre or per unit as if we sacrifice the industrial value of the tidal lands and use them as an adjunct, you might say, as a bonus or adjunct to the residential. I regard the tidelands as a very great addition to the use of the land. It gives one a water garden, so to speak, in his back yard. Instead of jumping right out into the ship canal the shore gives him a beach coast; and the meadow lands of the Spanish Bight and the Whalers Bight give him a play ground for his children and can be filled for residential purposes. These tidal

lands lay for the most part between the bulkhead and pierhead lines, there being only 40.6 acres adjoining the bluff that is above mean high water. The slope to the bay there is very gradual. It goes down, perhaps, an average of not over five feet for the entire 2,000 feet in width. Because the bottom of the bay suddenly chops off into the ship channel, that land and water, with a little dredging,
136 would be made a suitable harbor and speedway for motor craft and yachts and various water things of that kind. The rest of it, if desired, can be turned into lagoons and islands and canals, or whatever appealed to the fancy of the architect or landscape engineer in charge. It would give the city of North Coronado a wonderful front or back door, whichever you might term it, front or back yard. I would, perhaps, term it a front yard instead of a back yard, and that value is undoubtedly a substantial one when reflected for purely residential purposes. In regard to the availability of the tidelands for commercial purposes, first of all, it is of sufficient magnitude, being about 2,000 feet in width, to develop by itself, regardless of the balance of the Bay of San Diego. It is a unit. You could have there, as one of these maps shows, in one of the forms of utility uses—you could have a tidal basin where ships could moor, could handle themselves without the aid of pilots or tugs; they could dock. It is big enough for a full development. Second, it has wonderful adjoining water-front land, as the map shows, and as you know—as we all know. That soil is uniformly nearly level, no breaks in it, no canyons, no ravines, no arroyos. Third, the character of the substrata on this tidal basin, this tidal prism, this tidal flats, is known by a test that has been made and that I am aware of—is known to be such that it can be very economically drained, perhaps more so than any other part of the Bay of San Diego. And then it is close to the port entrance; it is close to the ship channel; it is at the ship channel; there is no intervening body of mud flats, like we have across La Playa and over at the Marine Base, and over in front of most all of San Diego. Ballast Point would be the geographical point at the entrance of San Diego Harbor. North Island is just across the channel there at the narrows. North Island Harbor would be the proximate harbor
137 for ships entering San Diego Bay. I am familiar with the physical configuration of the Golden Gate, in San Francisco Bay. The line of the Golden Gate corresponds analogously to a line from Ballast Point to North Island. And as between San Francisco on one side and on the other side of the channel, Berkeley and Alameda, North Island would correspond in point of topical relation to San Francisco. North Island lends itself most favorably to what we call a modern water-front development. That is, first, you have the channel and the tidal basin. Second, protected, convenient, no expense for dredging in the fairway at all. The Government would keep that up at its own expense, which is not what we do elsewhere, at Alameda, and so on. Third, you have these piers extending out about a thousand feet, and between them what we call the docks,

which is simply where you dredge the dirt out, and at the bulkhead line you have a street or highway, called the Embarcadero, with railroad tracks and vehicular pavement. And then, against the bluff, which rises about 12 feet perpendicularly above the bay shore, you would put your warehouses. On your piers you would put the transit sheds, as we term them, which are not meant to store freight, but as a convenient place to move it from rail to water or the reverse. Back of these warehouses, with their main floors the level of the transit sheds, and the second floors on the level of the great level of the island, or the mesa, you would have other storehouses, and industrial lofts and commercial centers, such as Los Angeles has been so successful with the last two or three years, and perhaps some day, more modern ideas yet, but these things are those that are imminent and in demand and pressing all over the coast. As a railroad terminal—it is necessary to have certain railroad facilities, breaking-up yards, and making-up yards, where any large amount of water-front business is conducted; and the main thing in a railroad terminal are the conveniences of the location and the room, and the unity of
138 the land, and the continuity, having it all in one parcel. You can get flat land almost anywhere, and you can put a railroad most anywhere, but the point is your railroad terminal must be economically well placed. Here, therefore, you would be bound to have a terminal in connection with your other work. It is a necessary feature of it, and I would place that terminal as the maker of that map has done, convenient to the ferry slips, the freight slip there, as shown, where there is forty feet of water right off of it, and convenient to the industrial section, the water-front section, and the piers and docks. I was engaged for seven years in the Federal-valuation work of the railways. In my opinion, as of the first of August, 1917, and having regard to all the adaptabilities to which North Island could be put, its fair market value as of that date was $7,300,000. In my judgment the value of the tidelands, the 663.3 acres, as of August, 1917, was $4,000 an acre for commercial purposes. In my judgment the value of these 1,200 acres of mesa land, apart from the commercial aspect of the tidelands, and assuming that the defendant did not own the 663 acres of tidelands, would be $5,000.00 an acre as of the first of August, 1917.

Cross-examination by Mr. LAWSON:

I have never been engaged in developing any subdivision. As a practical real estate man, I have had nothing to do with the development of subdivisions. I have been engaged in the valuation of land. I have bought and sold land for my own purposes and for others—quite a good many thousand dollars. I would have to figure it up. The purchases have been mostly tideland propositions. I bought properties, not for subdivision; that has not been my work; my work has been valuation. The largest purchase I ever made of tidelands was perhaps $40,000 at a time. It runs as high as 40 cents a square foot, under 20 or 30 feet of water. We

don't buy it by acres, we buy that by square feet. It would be $25,000 an acre at the rate that we pay, from there down to perhaps $14,000 or $12,000. As a matter of fact we are getting together a good many segregated parcels to make a whole for tidal development, and we buy these segregated parcels in order that we may acquire the whole. These parcels are in lots, and they run about 7,500 square feet to the lot, which at 40 cents will give you, as you see, $3,000 a lot. We pay from 40 cents to 30, and when I can get it cheap enough, down as low as 10 or 15. By "we" I mean an association of gentlemen. Mr. T. P. Andrews is one of the main gentlemen. We have offices, 403–4 Chronicle Building, San Francisco. We are engaged in the real estate business, or the buying of tidelands and selling them. I have appraised the value of the tidelands at North Island at $4,000 an acre for commercial purposes. One of the reasons is that the basin could be economically dredged and the general condition of the basin and of the tidelands would make it easy of development. That is not the principal reason. There are many other reasons that I would be glad to tell you if you wish to hear them. North Island—the port of San Diego—is nearer geographically, 100 to 225 miles, to the great circle of navigation between the Isthmus of Panama, Honolulu, Yokahama, and Hongkong. That is, nearer to all the United States south of the line below the latitude of New York and Pittsburgh than any of our northern ports, thus embracing a large percentage of the commercial business of the United States. It is on the short line of travel of business from the back countries of New Mexico, part of old Mexico, Imperial Valley—the great irrigation areas that are being developed now. It has this new railroad, or had in 1917, as an accomplished fact, nearly; the new railroad backed by very powerful interests, and was really the only Pacific seaport the Rock Island System had, or will have, or has to-day. The Phelps-Dodge people are also behind it, one of the most powerful concerns financially that we have in the country. They are going to give this port what it has never had before—a chance. They are bound to, because they have nowhere else—to date. They have been on the shoestring of the Santa Fe System here before. I regard as perhaps the greatest factor, at least, a very great factor, in answer to your question, the transcontinental railway and its accessibility to this island. It is on the low altitude line of the air railways, if you want to term it so, between the East and the West, the line through the Southern States and Texas being for most of the areas usable, as against the storms of the Sierras and Rockies of the North. With regard to this port itself, this island is directly on the ship channel, which is more than you can say of the water-front lands in the rest of the port. You haven't any rest of the port, hardly. You have given away a large part of it to the Government of the United States, at least, a large part. You have cut the rest of it up into isolated fragments here and there. You are, in fact, held down by your State law, which prevents you

from leasing them more than a certain period of years, and more than that, which gives them the right to terminate the lease at the option of the city on an appraisal of the property. No man is going to put great improvements on any such kind of lease as that. So that it has a great advantage over the mainland for any large interests coming. None of your water-front land over there is open and free to the pierhead line or to the commerce of the bay. It has got to pass over the mud flats belonging to the city for the most part. The shape and size of those mud flats are against economical development. The foundation, as shown by your new city pier that you are building, the test pits, and all that—the
141 test borings—indicate rather a treacherous character of subsoil, quicksand. You had the same character of trouble when you built your present one. They had the same trouble when they built the Marine Base. We do not have that kind of trouble on North Island. We can build our docks cheaper. We can put them on a more firm foundation and they will stay over night. There is no silting in this inner harbor we have laid out for you. You have two or three rivers emptying into the bay here. You used to have the San Diego River, which silted you up a little, but in the upper part of the bay you always had to do some dredging. That would be an item of expense to whoever is on the water front down there. You have freedom of development in this private ownership for water-front purposes that you do not possess on the city water front. You have back land there a mile and a half deep that you can run in all sorts of industries, and the average industry on the water front takes in from fifteen to eighteen hundred feet in depth, as shown on the Pacific coast. That is a matter of fact that we have investigated. You have the advantage of a deep-line water front to work upon. You can not find a piece of deep ground on the other side unless you go over to National City, where you have the advantage of a depth of water front. You run into the city streets, the Santa Fe Railroad, and all that right away. It seems to me that it is hardly comparable when you analyze all those commercial conditions. It is so much better than anything else that you have left in the harbor. I don't know whether that answers your question. I think it would be a disadvantage to San Diego for the Government to take over North Island for an aviation field—from a commercial standpoint. For commercial purposes I should be sorry to see the Government take it. We have the same trouble there in San Francisco. We are opposed to the Government taking Hunters Point for the same reason. The Government killed part of
142 San Francisco with the Presidio, and also Monterey with the Presidio.

LOUIS H. MOOSER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. DUNNE:

I am in the real estate business in San Francisco, and have been for sixteen years. I am the president of the San Francisco realty

board. I am also the United States surveyor general for California. In the course of my business experience I have come in touch with tidelands, water front lands, their value and their adaptabilities for uses residential and commercial. The largest tract of land that I have had experience with in that regard was the Islais Creek—the litigation between the State of California and the owners of that tract of land—consisting of 93 square blocks of submerged land on the water front of San Francisco. The next largest tract similar was that tract occupied by the Panama Pacific Exposition, consisting of 663 acres of submerged land on the water front of the northern part of San Francisco. And I acted as arbitrator representing the city of San Francisco in the arbitration of the exchange of lands between the Southern Pacific Company on what is known as Channel Street, in San Francisco, for the lands lying at the foot of Van Ness Avenue, submerged. I also appraised for the United States Government all of the lands surrounding Hunters Point for naval base purposes, consisting of over a thousand acres of submerged lands surrounding Hunter's Point. I also appraised for the
143 owners of lands on the Marin County shore for naval base purposes, and am familiar with tidelands, submerged lands, and water front lands generally. In the exchange between the city and the Southern Pacific Company the city took the tidelands on the Bay of San Francisco, on the northerly shore and east of Black Point. There were in that area six blocks, 275 feet by 412½, and the streets. It is being now developed as an aquatic park. The exposition lands extended from Van Ness Avenue on the east to Baker Street on the west, and from Chestnut Street on the bay, running north and south out into the bay, an area, as I say, of approximately 660 odd acres. After the exposition was over—this land is owned by hundreds of separate owners—they held a meeting for the purpose of determining what best use the land could be put to. I am familiar with real estate and tideland values in the Bay of San Francisco. I was first on North Island when they were building the Hotel Del Coronado, something over thirty years ago. That tract of land is adaptable to residential, commercial, industrial, railroad terminals purposes. It is adaptable for residential purposes due to its location, its climatic conditions, its nearness to surrounding populated territory, and in many respects it is ideal. It is adaptable commercially principally because of its water front facilities. It has its own water front. It is ideal in that respect. I know of but very few other pieces of property located on the water front in the State of California where the individual title goes out to the pierhead line. It is easily adaptable to the purpose of a railroad terminal, and its main industrial value comes from the fact that water and rail are brought together. In my judgment, the fair market value of that property, as of the 1st of August, 1917, in view of all the adaptabilities to which it could be put, was seven million dollars. I put the square foot value of the 663.3 acres of tidelands

144 down at nine cents. I believe that makes $3,920 an acre. I would place two different values on the mesa lands. If the entire island were used exclusively residentially and the water front made use of for an aquatic park, bathing establishments, and establishments of that character, in order to enhance the value of the residential land, I would put the value of the residential land as high as $5,000 an acre. But I am of the opinion that it would not carry as high a value residentially if it were developed commercially and industrially; and I would put it as low as $3,500 an acre. In measuring the value residentially at $3,500 an acre I would take into consideration also that the tidal lands would have the appreciation resulting from their commercial use.

Cross-examination by *Mr.* LAWSON:

In case the upland was devoted to residences, I don't think that would affect the value of the tidelands at all. I think there is enough territory there to develop the industrial part without its being affected by the residential. The mesa land in itself is sufficient for residential purposes, and so is the industrial part—the lower land, the water front land. There is plenty of it there to develop that without its being affected—the commercial value of the tidelands would not be affected, because you would not be inclined to run a high class residential land down to the commercial. When I speak of using the island for industrial purposes, I don't mean the whole island. The kind of industries I would select for the island would be—well, lumber yards, manufacturing industries, warehouses, and commercial industries of all kinds that are usually found on water fronts. I would allow six hundred odd acres which is naturally laid out for commercial and industrial
145 purposes—I would allow that for the industrial part of the island. And, of course, in order to support such industries there would necessarily have to be the labor to run them. I calculated upon that; that is the way I would make the difference. I made provision for their habitation on the island. There would be a zone between the industrial zone and the high class residential zone for a bungalow district—there would be a strip there approximating 480 acres. I would zone out for such purposes that portion adjoining the industrial part, a strip between the industrial part and the center of the island up this way [pointing to the south]. In making my estimate of the residential value of the island, and figuring it at $3,500, I included the 480 acres; I have taken all into consideration. I charge that all at $3,500. That is why I reduced it to $3,500, taking all the uses into consideration; the high residential and the low residential, taking them all into consideration, I have taken the figure of $3,500. I appraise the 480 acres in that zone, the land in its raw state, at $3,500 an acre. I first arrived at my opinion in this case as to the value of that land on last Monday morning. I first took up the matter with regard to the investigation of the island within the last two weeks. I don't know that I have been subpœnaed at all in this case. I was

notified to be here as a witness within the last two weeks. In making up that opinion I have projected myself backward to August 1, 1917, and visualized the conditions then. I was all over the island in 1914. When I arrived at my opinion I thought in concepts of August 1, 1917, giving due consideration to the market at that time. It is my opinion that on the prevailing market of August 1, 1917, that I would attach a value of $5,000 per acre to the raw land on North Island, for residential purposes, if it were developed for high class re-
146 stricted residential purposes. If the land would be developed, it would be worth that. I did not attach a value of $5,000 an acre. I say if it were developed as a high class residential and restricted tract, the upper portion of it would be worth $5,000 an acre, but I haven't placed that value upon it. That would not be dependent upon these developments that I have just mentioned; that is taking into consideration only the condition of the property in 1917. But I have not used $5,000. I haven't mentioned $5,000; $3,500 was my figure, bearing in mind the entire uses for which the property can be adapted to. I did say that the high portion of that land would be worth $5,000 an acre for purely residential purposes. At the time that I arrived at my opinion, I did not have in mind that it would be worth that much if those improvements were put into the island. It would be worth a great deal more than that if it were all developed. If streets, sewers, and all the accessories were put in, it would be worth more than that. I am treating the land as I find it. I would not advise anybody to buy that land if there was not contemplated some development on the land, at $5,000 an acre or any other price. I would not advise anybody to buy a piece of property if I could not see that it was adaptable to some use—some good use, and worth the value attached, I wouldn't advise them to buy it. I would not buy it at $5,000 an acre unless I knew it was going to be developed. I would not advise anybody to buy it unless I thought it was going to be developed—unless I thought it could be developed. When I arrived at my opinion I had in mind everything that the property could be adapted to. I took everything into consideration when I came to a conclusion of value. You can't nail me down to any particular use to which the property could be put, because I am taking all the uses to which the property is adapted into consideration when I arrived at the value. I myself would
147 not put $5,000 an acre into that land unless I knew it was going to be improved. I certainly did have that in mind at that time. I had in mind that the island would be paved, and that the streets would be lighted, and sewers would be put in and curbing and sidewalks and so forth. I could see that picture. That is part of a real estate man's business. That is part of my business, to visualize a project which is in the future, and picturize. There would not be any city of San Diego if there wasn't real estate men to see in advance. I saw that vision; and in that vision I saw all these improvements on the island. And therefore, in view of all the con-

templated improvements that would be put into it, I arrived at the opinion of $5,000 an acre.

Mr. LAWSON. I make a motion at this time, your honor, to strike out the testimony of this witness in regard to that phase of his direct testimony, that he attached a value of $5,000 an acre to the land for residential purposes.

Mr. DUNNE. It is very evident that the witness has testified to the adaptability as is for residential purposes and has said that its value as a residential district would be very much more than $5,000 an acre if it were improved.

The COURT. I think the witness' testimony as it stands now is very questionable. The cross-examination has certainly thrown doubt upon the admissibility and relevancy of his testimony.

Q. You have testified concerning the value of this land as of August 1st, 1917. Upon what did you base your opinion concerning the value of this land?

A. Upon the value of similar lands, similarly located, that I am familiar with throughout the State.

Q. Well, what particular things did you take into consideration in giving that value, that estimated value?

A. The use to which the property can be adapted for residential purposes, for industrial purposes, for terminals, taking
148 all things into consideration.

Q. Well, were you in doing that considering its market value, or what value might be produced by spending a lot of money on it in doing these things?

A. No; its market value as is.

Q. The market value that existed on August 1st, 1917?

A. 1917, August 1st.

Q. You did not take into consideration the fact that the whole character of the property would be changed by spending a lot of capital or a lot of money upon the land?

A. Well, as I have answered before, I could visualize that. I can see what can be done with a piece of property when I look at it.

Q. Well, in making up the amount that you stated the property was worth, did you take into consideration what might result from these improvements, capital investments, and division into lots, and building of piers and the receipts of money that might result from such investment, or did you really consider now the market value of the property, what it might be sold for under certain conditions, with proper puffing, and so forth?

A. I considered what it might be sold for, bearing in mind the many uses to which it could be put. Those things—a real estate man, whenever he makes an appraisement, and that is my specialty; I have been appraising lands for the last 15 years, doing that almost exclusively; I don't think there is anybody in San Francisco that has appraised any more than I have. I have always made a mental picture of what could be done with vacant land when appraising.

Q. Well, your opinion is that the value you have given would be a just compensation for that land as of August 1st, 1917?

A. Yes, sir. I realize how difficult it is for a witness to
149 give testimony as to the method that he exercises in arriving at a conclusion. If I were talking to you in an office I could talk differently than I do here, and I could point out to you the method that I use in arriving at my conclusion. But we are so hampered by law when on the witness stand that it is extremely difficult to make it clear. And I don't want to appear here as simply testifying to a figure because that figure happens to be close to what somebody else has used. I am using my judgment as a real estate expert, and have arrived at these figures from the known methods of real estate men in arriving at the values of property. I would like to be able to point out my methods and my comparisons and the reasons that I have adopted for arriving at this figure. I might say—and I don't want it put down if it is out of order—that if there is any other piece of property in the State of California, water front property, located as this is that can be purchased for 9 cents a square foot, I don't know where it is.

Redirect examination by Mr. DUNNE:

Q. Mr. Mooser, in putting your valuation of so much an acre on this property as of 1917, if I understand you, you did not figure on how much money would have to be put in for improvements, and then what the property could be sold for?

Mr. LAWSON. Just a moment. I object to that. I object to the form of the question as purely leading, which is not permissible on direct examination.

Mr. DUNNE. I beg your pardon. I want to ascertain if he proceeded upon a speculative method, your honor.

The COURT. I think the question is proper. Read it, Mr. Reporter. There was an interruption there. Let's see what it is [question read].

150 Mr. LAWSON. I think, your honor, that is purely a leading question. Of course, if that is not a proper objection, I apologize, but it seems to me that this witness belongs to the other side, and this is not more than redirect examination, which does not throw down the bars and give him the full scope of a cross-examiner, and that is purely a leading question. It seems to me the question should be calling for the conclusion of this witness without putting the ideas or stating the ideas first before he, the witness, arrives at his conclusion.

Mr. DUNNE. Well, I must identify whether the witness has put it as a result of speculation.

The COURT. I will overrule the objection.

The WITNESS. I arrived at my figure, first, by taking the raw land as I saw it——

Mr. DUNNE. No. Will you first answer the question? I will ask the reporter to read it to you [question read].

A. No, sir. I did not mean to be understood for a moment that after this property had been improved, as Mr. Lawson suggested, and was put upon the market in its improved condition, that I was then valuing it at $5,000 with all these improvements upon it.

The COURT. I understood you to say it was an estimate less the value of the capital put into it?

A. No; I don't think I did. I don't think I said that. I didn't intend to say that, if I was understood as having said that.

Mr. DUNNE. Q. In considering the value as of August 1st, 1917, did you go beyond or include anything other than the uses to which that raw land could be put as of that date?

A. I did not.

The COURT. The motion to strike will be denied.

151 APRIL 20, 1920—2 p. m.

The COURT. Call your witness. The jury is present.

Mr. DUNNE: We rest, your Honor.

The COURT. The objection that the plaintiff made to the admissibility of evidence when the first witness was called on the stand, will be overruled, and exception entered.

(The objection referred to by the court is that made on page —— in the testimony of the witness, Howard C. Holmes.)

G. E. GARDNER, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. DENIS:

My business is that of a realty broker and appraiser; I have been such about 20 years. My residence during that time has been in Los Angeles. During that 20 years I have made appraisals for the city of Los Angeles, for Los Angeles County, for the Pacific Electric Railway, and for the Los Angeles County flood-control district, and for various individuals, over a period of years. I appraised a strip of land 23 miles long extending along the water front north of Santa Monica, which was under condemnation for road purposes. I appraised a strip of land over the San Fernando Valley, which was condemned for the same purpose, also a strip through the Sunland district under condemnation for road purposes. I appraised a strip of land between the city of Los Angeles and Venice for a drainage district. I appraised 72 acres lying next to the harbor in San Pedro,

152 adjoining the submarine base reserve, a part of which was subdivided and part in acreage. I appraised a thousand lots lying along the Long Beach and Wilmington Harbor. I appraised a strip of land for the Los Angeles County flood-control district through the Clearwater Hines district, running through about 25 different ranches. I was appointed referee by Judge Wood, of Los Angeles County, to fix a value on a parcel or strip of land running through about 25 owners in the Fruitland district. I am the appraiser now of the Los Angeles County flood-control district, and for them I have just completed the appraising of a strip through the

industrial district of the city of Long Beach, 720 feet wide, containing about 1,200 different parcels. I am also the purchasing agent of the flood-control district, and for them I have purchased about 75 per cent of that property at my appraised price. Part of that property is tideland; there is about 35 acres of that property that is tideland, adjoining tide water. I appraised properties on both sides of the street for the proceedings to widen Sixth Street in Los Angeles, from Olive Street to Figuero, and various other parcels. I have investigated the value of North Island, which is in litigation here. I began my investigation into the condition and value of North Island in the first part of December last year. I visited the island and made a careful inspection of it, taking into consideration its various exposures and the condition of the soil and the adaptability of the soil to cultivation, and its general topography, and the possible expense necessary in subdivision in any form for marketing. I investigated conditions on Coronado Island, interviewing a large number of realty operators, bankers, business men and city officials, with the view of ascertaining what the market value of Coronado Island properties were, what the demand was, and what the supply was for that demand, the prices at which Coronado Island properties had been sold and the prices at which they were available to-day. I also called on the city officials with a view to ascertaining the
153 number of transfers that were made in Coronado Island over a period of years, and the number of building permits that had been issued there, and also to discuss with them the water possibility. I also talked to two or three bankers and real estate men there regarding what they considered North Island available for, and what its probable or possible market value might be. I interviewed a large number of citizens, real estate men, business men, bankers, and city officials in San Diego, with the idea of ascertaining the condition of the realty market here, the demand for property, and the amount of property which was available to supply the demand. I called on the San Diego Harbor board to ascertain the extent of the harbor property, the water frontage, that was available, and under what terms or conditions it might be had. I also called on the secretary of the State harbor commission here for the same purpose. In determining in my own mind what North Island would be best adapted for, I considered its possibilities as a high class exclusive residence district, and with a view to investigating the market which might be available for such property in a broader field, in a broader way than San Diego and Coronado, I investigated the success that was being met with by others marketing high-class tracts in other districts—in Del Monte, where they had a campaign on for the marketing of Pebble Beach, and in Santa Barbara where Hope Ranch and Montecito and Del Mar have been offered for many years; also along the front at Santa Monica and Long Beach, in Los Angeles County. My investigation in those places was merely to determine, in my own mind, what the market might be in a broader way for high-class restricted residence lots which might be offered on North Island

in the same way or to the same purchasers that these other subdivisions were being offered. In my opinion, North Island's present use would have to be restricted to residence purposes. I believe
154 there would be a market, or there is a market, which would absorb any industrial property on North Island. I think there is plenty around San Diego Bay to satisfy the demands for a number of years. I don't believe that it would be marketed or that a market could be found, or a demand found which would absorb any portion of North Island for industrial property, and I believe that its higher use would be a residence property, and industrial property bordering on the residence property would affect the value—hurt it. I think I have stated fully the investigations that I made and the sources of information which I applied, upon which I base an opinion of its value. I have placed a value on the so-called tidal lands or submerged lands. I have investigated the tidelands around San Diego Bay, the manner in which they are offered to people who wish to use them, and the rates at which they are available. I also made an examination as to the extent of such property that would be available for use around San Diego Harbor. I believe the tidelands of North Island could be used for industrial purposes, but there is no demand for them. There is no market for them. They could not be sold to-day. There is no market value for tidelands, I mean as of August 1, 1917. I don't believe they could be marketed as tidelands. North Island might have been subdivided into small parcels for intensive cultivation—gardening, assuming that it could be watered—gardening and the planting of deciduous fruit trees. A portion of it might be placed on the market in that manner. I think I have fully stated what I have done to reach the conclusion which I have arrived at. I don't think that there is any further investigation that I made for the purpose of fixing its value. From such investigations as I have made, and have now testified to, my estimate, my opinion, as to the value of the upland, assuming the area to be 1,233 acres, is $886,400. I have been in court
155 since this trial commenced. I have heard that the area of the tidelands is 663.3 acres. My estimate of the value of those tidelands is $82,900.

Cross-examination by Mr. DUNNE:

I have never lived in San Diego. I have never carried on my realty business in San Diego. The elements of adaptability which qualify property for residential purposes are location, climatic conditions, access, soil conditions, and marketing. The elements of adaptability which qualify property for commercial use are access, convenience to commercial and industrial centers, and demand. I include in the term "access," access to water or rail, both. I inquired of the Coronado Beach Company, but I did not get the information that for its bare land sales in Coronado between 10th Street and the ocean, for the five years last past, was 38 cents per square foot, or $16,553 per acre. I got no sales from the Coronado Beach Company. I did not become informed from that company as to the sales of

average bare land between 10th Street and the bay for the last five years was 16.5 cents per square foot, or $7,187 per acre. I know where La Playa is situated. I never personally had any transaction in real estate on La Playa. I did not learn by a comparison of the actual sale figures in La Playa for the last five years that properties have been sold there for residential purposes at $3,920. I do not know where Ironton is. I know where Roseville, across the bay, is. I do not know where the district called New Roseville is. The figure that I gave for the tidal lands is $82,900 for 663.3 acres. That would be $125 per acre.

156 Redirect examination by Mr. DENIS:

I did not learn from the Coronado Beach Company of any land sales between 10th Street and the bay. I learned of a number of sales in that district, but no sales from them.

Mr. DENIS. Q. What did you learn as to sales in that district?

Mr. DUNNE. Do you mean by the Coronado Beach Company?

Mr. DENIS. Sales in that district between 10th Street and Bay Street.

Mr. DUNNE. I only asked him as to the Coronado Beach Company, the defendant in this case. I did not ask him about any other transaction.

The COURT. I think that is the same question that arose upon the examination of the defendant's witnesses, where they sought on redirect examination to elicit what properties had been sold for. The ruling will be the same. I will sustain the objection.

The WITNESS. I base my opinion of the value of the tidelands, of $125 an acre, upon the fact that before they could be sold to anybody for use a considerable sum of money would have to be spent on them, and that it would be a number of years before they could be used—before there would be a market that would make a demand for them—make it possible to sell them at all. In that connection I examined the value at which other tidal lands on San Diego Bay were held; and from such added information as that I reached the conclusion that those lands were worth $125 an acre. In that estimate I did not take into consideration the volume of business in San Diego in August, 1917. I didn't consider the volume of business done in 1917 as being a fair basis. I took into consideration the vol-
157 ume of business done in San Diego in 1913. The business in the harbor of San Diego fell off in 1917 much less than it was in 1913—not a normal year. I did consider the volume of business done in San Diego Bay in 1913, which was a normal year. It was more than in 1917. The volume of business fell off after the war started—that is, after 1914.

A. O. KELLIHER, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. DENIS:

My business and occupation is real estate broker and appraiser. I have been in that business about 18 years. Nine years in Los

Angeles and nine years in the State of Minnesota. Before coming to California, in Minnesota I appraised land for the Northern Pacific and the Minnesota International Railway. I was in the town-site business, platting and owning a town site of my own called Kelliher, Minnesota; had an interest in another town site in the same locality; bought and sold real estate for myself, appraised real estate for banks. Since coming to Los Angeles I have bought and sold real estate for myself and others. I was subdivision manager for two years, handling several subdivisions for the California Real Estate & Building Company; four years subdivision manager for the Janss Investment Company. I appraised lots for different private individuals in Los Angeles banks. I appraised a strip of land for the Los Angeles County flood control in different, principally through the industrial district of Long Beach, a strip 720 feet wide, 4½ miles in length, comprising over 1,200 parcels of land, in-
158 cluding several acreage pieces; appraised about 25 acres of land for the flood-control district in the fruit district near Vernon; appraised several hundred lots for the Bixby Estate at Long Beach, and various other small appraisals. I am also purchasing agent and appraiser for the Los Angeles County flood control. I have examined North Island. I commenced my examination of North Island, with a view to testifying to its value in this case, in the month of December, 1919. I visited the island and got a general view of the land, the lay of the land, and the surrounding country; investigated Coronado Island, the different subdivisions along and around San Diego, around Los Angeles, Long Beach, Montecito, Del Monte, Pasadena, Santa Monica. With reference to the value of North Island, I investigated a great many sales of property in Coronado that have been made in the last few years, and also property that is now being offered for sale by different real estate firms in Coronado; investigated the offerings and sales of property surrounding the water front in San Diego down as far as National City. The best purpose for which the property can be put to is residential purposes. I don't think there was any other use it could be put to in 1917. I have investigated North Island as to its use for industrial purposes. I reached the conclusion that there is plenty of industrial property to take care of San Diego for a long time to come, in 1917, and up to the present time. If the water, which I guess they have, could be gotten there, I think it might be put to farming use, to a certain extent. I have investigated the value of the tidelands, amounting, as has been agreed here, to 663 acres. To determine the value of those tidelands I investigated the tidelands that are in other parts of San Diego or in San Diego. I made inquiries from the harbor commission, the harbor master, and a few bankers and real estate men. I made inquiry as to how much
159 available land there was at San Diego, tideland at San Diego, in 1917. In my opinion the value of the uplands of North Island, consisting of 1,233 and a fraction acres, is $986,400. I have formed an opinion as to the value of the tidelands, consisting of 663.3

acres; and in my opinion the value of such tidelands is $100 an acre, $6,630.

PAUL A. CRIPPEN, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. DENIS:

I make a business of appraising real estate. I have been engaged in that business the last twelve years, solely, and prior to that time for six years in the real-estate brokerage business—18 years, all together. I have appraised property of all classes in all of the cities and more prominent towns in the southern part of California, and lands of all kinds and classes in the southern part of California. I have appraised property in all of the beach towns—for instance, Santa Monica, Ocean Park, Venice, Del Rey, Hermosa, Manhattan Beach, Redondo Beach, San Pedro, Wilmington, Long Beach, Naples, Bay City, Sunset Beach, Huntington Beach, Newport Beach, Balboa, and in one instance property in Coronado, and in one instance property in San Diego. I have been employed by all of the railroad companies running in and out of Los Angeles, in the appraisement of properties where rights of way were to be secured. I have been employed by the city of Los Angeles, by the county of Los Angeles, by the State of California in numerous cases, to
160 testify as to values of properties. I was employed by the city of Los Angeles on the Power Line right of way, the Owens River Power Line right of way, from Saugus into Los Angeles, a distance of about thirty miles. I was employed by the county of Los Angeles to fix a value on the right of way over the Malibu Ranch, leading from about eight miles north of Santa Monica, a distance of about 22 miles to the Ventura County line. I was employed by the city of Los Angeles to appraise property adjoining the submarine base at the port of San Pedro, which the city proposes to donate to the United States Government. I have been employed by the Los Angeles County flood-control district to fix values on lands in their right of way for flood-control channel, leading from the Cerritas Trestle north of Long Beach, down through the industrial district of Long Beach to the ocean, a distance of about four miles. I have been appointed by the courts of Los Angeles County as a receiver in partition, a referee in partition, and as referee in a number of condemnation suits. I have testified and been employed by defendants in probably 200 condemnation suits, perhaps more. I have made appraisements for individuals for various purposes, for instance, in the industrial town of Torrance for a bond issue, and private appraisements for all purposes in the matter of loans, so that purchasers or those who were engaged in deals in real estate may know the value of real estate, and in various kinds of lawsuits over real estate. In the beach towns that I have referred to I had occasion to examine into and give my opinion as to the value of tidelands, or lands adjacent to tidelands. In San

Pedro properties on the water front and immediately back of the water front; and in Wilmington, and in the new harbor of Long Beach, properties on the water front and adjacent to the water front, reclaimed tidelands. I have made an investigation of facts
161 and surroundings upon which I base an opinion as to the value of North Island. I started in in December of last year on my investigation of the conditions of North Island and San Diego. I first investigated the land in regard to its location and elevation and topography, the means of access, the soil conditions and water conditions, its exposure to ocean and bay, its distance from San Diego proper, and the climatic condition, its relation to South Island, its comparison to South Island in character and size, and its adaptability. I interviewed property owners on South Island; I talked to bankers in Coronado and in San Diego as to their opinion of the values of San Diego properties and the use to which North Island might be put, and what they considered to be the value of Coronado property with regard to making loans. I talked with a number of real estate owners and operators having property in Coronado for sale. I ascertained the properties that had been sold by various operators there, and the prices at which said properties had been sold; the number of properties in a general way for sale, and the prices at which many were offered for sale. I considered as a matter of comparison the improvements on North Island in the way of streets and sidewalks and curbs, sewers, gas, water, electricity. I took into consideration the way that the trees and shrubs and flowers and lawns are growing on Coronado Island, to indicate what might be done with North Island. I talked with a number of property owners and real-estate operators in San Diego to determine the extent of residence properties that had been subdivided and offered for sale, what portion had been sold and what portion was still for sale, and what the demand was—to determine what might be the market for a subdivision of North Island. I talked with property owners, with the State harbor commissioner, Mr. Gross, and with harbor commissioners of the city relative to the city's tide-
162 lands, and Mr. Gross of the State harbor commission relative to the State's tidelands in San Diego Bay to ascertain the extent of those tidelands, and upon what terms and conditions they might be had. I talked to the land department of the Santa Fe Railroad, the land department of that company having for sale or for lease lands at San Diego on the water front, and I talked with him regarding leases that they had made on some of their properties on the water front. I investigated one or two sales that had been made of property on the water front, not of submerged lands, but of property back of submerged lands—for instance, the Hercules Powder Company's property and Mr. Blackman's property at National City. I took into consideration the development of the industrial features along the harbor of San Diego, and took into consideration what the requirements were as indicated by the demand for properties around the harbor to determine what the possibilities

were for the use of North Island for industrial uses, commercial uses. I think that pretty nearly covers the investigation, with the exception that I also considered properties for sale on Point Loma and in other districts outside of San Diego to determine what the market was for high-class residence property. I examined into the value of properties—sales that had been made and properties offered for sale—upon Coronado Island. I spoke to one banker in Coronado and two in San Diego on that subject. I examined the records of transfers of property. I found out the number of transfers that had been made in Coronado property for a number of years, also the number of building permits, and the value of those buildings as indicated by the permits. I ascertained how much of the original subdivision of Coronado City remained in the ownership of the defendant here from the city assessor of Coronado.

Q. What percentage of the whole was that?

A. He told me about 40 per cent.

163 Mr. DUNNE. Well, I object to that as incompetent, what the assessor told him, and move to strike it out.

The COURT. It will be stricken out.

The WITNESS. From my investigations, and to which I have referred, I am able to state to what uses this property can be put, or, in other words, what it is best adapted for. To my mind its only use for any immediate future—that is, figuring as of August, 1917—was to cut up into country-home sites larger than the ordinary city lot, and sell off as the demand required, or as the market would absorb such sizes as there was a demand for. By so doing the excessive cost of high-class improvements, which would be necessary for the ordinary ultra-select residence subdivision, would be done away with to a very large extent, and such improvements as were required would be put in as the necessity demanded. I think its only use, and best use, the highest use, at that time was to be sold in parcels of, say, from five to ten acres, as the demand warranted. I would call that a residential use. Perhaps it would also partake of a small-farm use, not so much farms from a commercial standpoint as farms from the standpoint of the country gentleman who desired acres around his home to beautify, and perhaps also to indulge in gardening and the raising of trees and flowers and things of that kind. It may be adapted to the use of industries, and commercial, but to my mind there is no market for its use in that manner at this time or any immediate future. The demand is not there for it, and to my mind its consideration for those purposes is something considerably in the future. It might be cut up into subdivision similar to that on South Island; but, as I stated before, I think the excessive cost of putting in street improvements and sidewalks and curbs and paving and sewer and water, and a ferry property to make it accessible, and all those things, particularly since 1917, when

164 labor and materials of all kinds are so high—I think the excessive cost of putting in a subdivision of that character would have made it almost prohibitive; the selling price of lots would have

had to be so high, I think the market would not have absorbed them. It was available, but I think it would not be practical to subdivide it in that manner and expect to sell it in a reasonable time and to make a profit on it. From all that I have learned about North Island I have formed an opinion as to its value. I figure the value of the 1,233 acres of upland at $986,500. I have formed an opinion as to the value of the tidelands, consisting of 663.3 acres, on which I put a nominal value of $100 an acre. That would be $66,330.

Cross-examination by Mr. DUNNE:

The elements of adaptability which qualify property as having commercial value are location and accessibility, and its nearness to a point of business, where business is done. Railroads are necessary for industrial properties almost always, and for certain classes of industrial property water front is necessary. The presence of lands by way of geographical situation on a bay and harbor, such as San Diego Bay, is a contributive element of adaptability for commercial purposes. I never transacted real business in San Diego. I have not been in the brokerage business for more than 12 years. In the course of my investigation I did not inquire of the Coronado Beach Company, the defendant in this case, what the average selling price per square foot had been for its lots in Coronado, between Tenth Street and the ocean; or what its sales had been, its average selling price per square foot for the last five years of its lands in Coronado between Tenth Street and the bay.

165 Redirect examination by Mr. DENIS:

In matters of this kind I never inquire from one of the parties interested in the case.

THOMAS O'HALLARAN, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. DENIS:

My business or occupation is State inheritance tax appraiser. I appraise other property than at the request of the State. I have been engaged in appraising property since June, 1911. I appraised the Santa Margarita ranch, 242,000 acres; the Jamul ranch, of a little less than 10,000 acres; the San Felipe ranch, of 10,000 acres; and recently, all of the lands belonging to the San Diego Land Company in Chula Vista—a system of over 26,000 acres, reaching down to the bay to National City. That was in February of this year. I have appraised lands and lots in all parts of San Diego, all parts of Coronado, ranches all over the county. I live in San Diego and have lived here for 18 years. I was in the real estate business from 1905 to 1911, and since that time my business has been appraising real estate. I appraised one hundred pieces of country property and a hundred pieces of city property for the State tax commission four years ago. I think there were some tidelands included in the San Diego Land Company's holdings. I have had occasion to appraise the value of tidelands around San Diego Bay just in lots. Part

166 of San Diego is under the bay down here in lots, and once in a while some of those come up in an estate. I know North Island. I saw it the first time about 17 years ago. I have seen it frequently since. I have fished all around it, off from the edge of it, and on all sides of it. I have been on it a number of times. I think I know what uses it is adaptable for. It is adaptable for residential purposes; possibly for deciduous fruits. I have made no examination as to its use for industrial purposes. I have always understood that there was enough land on this side for all industrial purposes for some time. I have been over there and all over it a few times, investigated as to the soil, what could be done with it, comparing it with South Island—Coronado—as to how trees would grow on it, whether it would be necessary to have trees with surface roots or whether tap root trees would grow, and some investigation as to the question of water. I was employed by the Government to make this investigation some time the first of March. From the investigation that I have made, and from such things as I have theretofore known about the island, I am able to give an opinion as to its value as of August 1, 1917. The value of the upland, consisting of 1,233 acres, on August 1, 1917, was a million and forty-six thousand dollars. I have made an investigation as to the value of the 663 acres of tidelands. I made inquiries as to the value of the tidelands on this side of the bay. I heard the testimony of the several expert witnesses who testified in this case since its beginning. In my opinion, I know the value of those 663 3 acres of tidelands. The value of those tidelands, as of August 1, 1917, is $66,300.

The plaintiff rests.

167 G. E. GARDNER, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Redirect examination by Mr. DENIS:

Referring to the meadow and marsh lands connected with, belonging to, and a part of North Island, amounting to 207 acres and a fraction, I am prepared to testify to the value of such lands from the investigation and examination that I made, and to which I referred on yesterday. The value of those lands is $25,875, at the rate of $125 per acre.

Mr. DENIS. If your honor please, I think there will be no difficulty in our stipulating that the other Government witnesses, to wit, Messrs. Kelliher, Crippen, and O'Hallaran, will each testify to the value of these 207 acres, the same amount that they placed upon the submerged lands, to wit, one hundred dollars per acre.

Mr. DUNNE. No objection.

The COURT. Now, the 1,233, is that an exact figure?

Mr. DUNNE. It is 1,232.93.

The COURT. All right. Well, proceed, gentlemen, with the argument.

168 *Instructions to the jury.*

The COURT. Gentlemen of the jury, the Government of the United States in the exercise of its functions as a Government has the right and the power to condemn the land of a private citizen; that is, to take it for the use of the public, but the Constitution provides that private property shall not be taken for public use without just compensation.

The time with reference to which the value of the property in suit is to be fixed is the first day of August, 1917, being the date on which the plaintiff took possession of the property for public use.

The measure of the damage or compensation in this case is the market value of the land on August 1, 1917.

The language used in the fifth amendment of the Constitution of the United States, in respect to the matter of ascertaining the value of property taken by the Government for public use from private owners, is aptly chosen. The entire amendment is a series of negations, denials of rights of power in the Government, the last, the one in point here, being "nor shall private property be taken for public use without just compensation." The noun "compensation" standing by itself, carries the idea of an equivalent. Thus, we speak of damage by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being an equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property; and this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the com-

169 pensation must be a full and perfect equivalent for the property taken, and this just compensation, it will be noticed, is for the property and not to the owner. It is the actual value of the land with all its adaptations to general and special uses, and not its prospective or speculative value based upon future expenditures and improvements, that is to be considered.

While the law requires that when property is condemned a full and fair equivalent for the property taken should be paid, the jury should understand that this sum is not to be determined by the use to which the land in question was put at the time of the taking. That is to say, as to whether the use at the time of the taking was profitable or unprofitable, or whether it was being used at all. The use to which the property was put at the time of the taking may not have been the best use to which the property could be put, nor is the owner bound to continue any particular use or to put it to any use whatever. That is not the test. The owner is entitled to receive such a sum as will fully compensate him for the fair market value of the property at the time of the taking. It is proper to consider for what purposes the land might have been used to advantage in

order to determine for what price it would be sold. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted. But it is the tract, and not the lots into which it might be divided, that is to be valued. You are to value the tract of land, and that only. You are not to determine how it could best be divided into building lots, or to conjecture how fast they could be sold or at what price per lot. A speculator or investor, in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. You should do the same thing. You are not to inquire what a speculator owner might be able to realize in the future, but
170 what a present purchaser would be willing to pay for it in the condition it was at the time of the taking. If the property is available for building lots or available for commercial purposes or wharves or docks or terminals or industries, or any other legitimate use, even though it may not be used for any of those purposes, or may be left unused by the owner, such availabilities are all to be considered, and they should enter into the estimate of the compensation which must be paid for the land taken. Mere speculative values and profits in the manipulation of the property are, of course, to be excluded. The condition of the property, the use to which it may be put, having regard to the existing advantages for making a practical use of the property and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the land. But to attempt to ascertain the value by estimating the cost of improvements necessary for its use for a particular purpose, the cost of subdivision and sale, the prospect of sales and estimated profits and increased demands through growth of population, would be speculative. In other words, the value can not be determined by taking into consideration what would be the earning power of the property after a large investment of capital is made.

By the term "market value" is meant not what the owner could realize at a forced sale, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property.

In determining the market value of the land in controversy you are not bound by the opinion as to such value expressed by any one or more of the witnesses who have testified in the case. It is proper that you should consider such testimony and give it such weight and credit as in your judgment it deserves, but if in your judgment the value fixed by one or more of the witnesses who have testified
171 in the case is not reasonable, you should disregard it and find such amount as in your judgment would be reasonable from the facts that you believe to be established by the evidence in the case.

While you should take into consideration any evidence in the case tending to show what the land in controversy is specially adapted to any particular purpose or use, you should consider this only to

the extent that such adaptability may affect the market value of the property; but you will not be justified in awarding the defendant compensation based upon an adaptability of the property to any special purpose or use which in your judgment exceeds the actual market value of the land.

The burden of proof as to the actual market value of the land sought to be condemned in this action rests upon the defendant, which it is its duty to establish to your satisfaction by a preponderance of the evidence.

In determining the weight to be given by you to the opinions of the various witnesses as to the actual market value of the land in question, you may consider, among other things, the familiarity shown by each witness with the particular property; you may consider the testimony given by each of such witnesses as to the investigations made by each witness in the matters that would ordinarily tend to make such witnesses familiar with such property and its value; and you may consider the character and extent of such investigation for the purpose of determining the value and weight that you may, in your discretion, attach to the opinions of the witnesses.

In determining the amount of compensation which should be awarded for the property taken, you must not adopt the plan of taking the aggregate of the sums testified to by the various witnesses for the value, and dividing such aggregate sum by the number of such witnesses, and awarding by your verdict the
172 average thus obtained. Nor can you arrive at a verdict in this case by adding together the sums believed by individual jurors to be the market value and dividing such aggregate sum by twelve, and fix such sum as the market value of the property. This does not mean, however, that the opinions of the various witnesses should not be regarded by you. You are to consider all the evidence, and after weighing the same fix upon such value as in your judgment represents the fair market value of the property as of August 1st, 1917.

While you must follow the court's instructions as to the law of the case, you are the sole judges of the facts and the credibility of the witnesses: and if the court expresses an opinion or comments either upon the facts or the credibility of witnesses, you are not bound by such opinion or comments, and should exercise your own independent judgment in such matters.

Among the circumstances to be considered by you in passing upon the credibility of witnesses are their relation to the case and its parties, their motives, and their manner upon the witness stand. In this litigation many witnesses have been called by the parties on each side that are often called expert witnesses; that is, witnesses who are called upon to express an opinion concerning the value of the land in controversy. In determining the weight to be given to such opinions you should consider the fact that no person can be convicted for perjury by reason of his testifying to an opinion con-

cerning the value of real estate, except upon his own admissions or confessions.

Plats and maps of the property in question have been received in evidence and should be considered by the jury, not for the purpose of exhibiting some contemplated improvements or speculative deal,
but for the purpose of illustrating the witnesses's testimony
173 concerning the particular uses to which the property may be
adapted in his opinion, and by way of showing the capabilities of such property. With this limitation and from this point of view maps and plats have been admitted in evidence in this case, and as thus limited and qualified it is proper for the jury to consider them for such illustration and enlightenment as they may afford touching the uses and capabilities of the property.

The land in question whose value you are to fix, and which has been described in the act of Congress as the whole of North Island, includes not only the upland as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the anchorage of ships, and the line of that anchorage is precisely defined by the United States survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence. Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation, and in this respect I instruct you that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed as it has been, beyond which a solid fill is not permissible without consent of the Government, and that it is likewise a reasonable public regulation that the pierhead line be fixed as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks,
piers, warehouses, terminals, or other improvements on these
174 submerged lands, subject to these regulations; and in so con-
structing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands. And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same were derived from the former Government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the Government by this survey and patent.

This case, like all cases triable in a court of justice, should be determined by the jury upon the evidence before them, and upon that alone, subject to the rules of law laid down for your guidance

by the court; and no juror acting conscientiously can base his verdict upon any other consideration. Juries are empanelled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after consultation and consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others.

The form of verdict, general verdict, which you are directed to return, will be as follows:

"We, the jury in the above-entitled case, find the fair market value of the land of North Island, as of August 1st, 1917, was ———— dollars," inserting the amount of dollars. "Dated April 21, 1920," and let the foreman of the jury sign it.

And the court directs you that if you return a general ver-
175 dict you shall return a special verdict. This special verdict, the form of which is hereby submitted to you, is in the form of interrogatories, which is the practice in the State of California. The first interrogatory is as follows:

"No. 1. What was the fair market value on August 1, 1917, of the land lying above high-water mark, containing 1,232.93 acres, more or less, referred to as mesa land?"

That you will answer. A blank space is left for the amount.

"Interrogatory No. 2. What was the fair market value on August 1, 1917, of the 207.24 acres lying above high-water mark, referred to as meadow, marsh, and beach land?"

There is a blank space left for the answer.

"No. 3. What was the fair market value, on August 1, 1917, of the lands lying below high-water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands?"

You will fill in the blank and let the foreman sign it and date it.

When you retire to consider of your verdict, elect one of your number foreman; and when you shall have agreed upon a verdict let the foreman sign it and return into court.

You may not agree upon a verdict or answer any of these questions unless you all concur in the verdict or answer.

The COURT. Are there any exceptions, gentlemen, to the charge to the jury?

Mr. DENIS. The Government has none, excepting the refusal of the court to charge as requested by the Government in the last instruction, in regard to tidelands. And then the Government also desires to except to the instruction with reference to the title to the submerged lands. With these exceptions I know of no other instruction.

The COURT. You particularly refer to the instruction that
176 the patent extends out to the anchorage? Including 663 acres?

Mr. DENIS. The whole of that instruction; yes, your Honor; those are the only two.

The instruction given by the court and excepted to by plaintiff reads as follows:

"The land in question whose value you are to fix, and which has been described in the act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the anchorage of ships, and the line of that anchorage is precisely defined by the United States survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence. Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation, and in this respect I instruct you that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed as it has been, beyond which a solid fill is not permissible without consent of the Government, and that it is likewise a reasonable public regulation that the pierhead line be fixed as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers, warehouses, terminals, or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements the Coronado Beach Company would be exercising the right to
177 use its privately owned tidelands. And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same were derived from the former Government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the Government by the survey and patent."

The instruction requested by the Government and refused by the court, to which refusal plaintiff duly excepted, reads as follows:

"You are instructed that the State of California is the owner of all land bordering upon tide water within the State which is below the ordinary high-water mark. Therefore the private ownership of land bordering upon tide water in this State can only extend to the ordinary high-water mark."

Mr. DUNNE. And, if your Honor please, the only exception we care to reserve is an exception to the returning of anything other than a general verdict. I really do not think the case requires it, and I think I would like to save the point.

(The bailiffs were sworn to take charge of the jury, and the jury retired to consider of their verdict.)

Thereafter the jury returned its verdict, and answers to special interrogatories directed by the court, as follows:

Verdict.

We, the jury in the above-entitled cause, find that the fair market value of the whole of North Island, as of August 1st, 1917, was $5,000,000 (five million dollars).

Answers to special interrogatories directed by the court.

No. 1. What was the fair market value on August 1, 1917, of the land lying above high-water mark, containing 1,232.93
178 acres, more or less, referred to as mesa land?

Answer. $4,625,000.00 (four million six hundred twenty-five thousand).

No. 2. What was the fair market value on August 1, 1917, of the 207.24 acres lying above high-water mark, referred to as meadow, marsh, and beach land?

Answer. $45,000.00 (forty-five thousand).

No. 3. What was the fair market value on August 1, 1917, of the lands lying below high-water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands?

Answer. $330,000.00 (three hundred thirty thousand).

179 A motion for a new trial was duly and legally made by the plaintiff herein upon the following grounds, to wit:

1. Irregularities in the proceedings of the court, by which the plaintiff was prevented from having a fair trial.

2. Irregularities in the proceedings of the jury, by which the plaintiff was prevented from having a fair trial.

3. Irregularities of and on behalf of the defendant, by which the plaintiff was prevented from having a fair trial.

4. Misconduct on the part of the jury, by which the plaintiff was prevented from having a fair trial.

5. Excessive award and damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict of the jury or judgment.

7. That the verdict of the jury is against law.

8. That the judgment entered thereon is against law.

9. Errors in law occurring at the trial and excepted to by the plaintiff.

This motion was heard by the above-entitled court on the 1st day of June, 1920, and the same was denied, and an exception to said decision was thereupon taken by the plaintiff herein and allowed by the court.

180 *Specifications of errors of law occurring at the trial.*

I.

The court erred in denying the motion of the plaintiff for a new trial.

II.

The court erred in instructing the jury, as follows:

The land in question whose value you are to fix, and which has been described in the act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the anchorage of ships, and the line of that anchorage is precisely defined by the United States survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence. Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation, and in this respect I instruct you that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed as it has been, beyond which a solid fill is not permissible without consent of the Government, and that it is likewise a reasonable public regulation that the pierhead line be fixed as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers,
181 warehouses, terminals, or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands. And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same was derived from the former Government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the Government by the survey and patent.

III.

The court erred in refusing to instruct the jury as requested by plaintiff as follows:

You are instructed that the State of California is the owner of all land bordering upon tidewater within the State which is below

the ordinary high-water mark. Therefore the private ownership of land bordering upon tidewater in this State can only extend to the ordinary high-water mark.

IV.

The court erred in overruling plaintiff's objection to, and admitting in evidence, a map offered by defendant and filed in said cause as defendant's Exhibit C, for the reason that said map did not merely show the uses to which the land could be adapted but was extended to speculative inquiries as to possible future uses, under circumstances which did not exist and which in the future may never exist; and for the further reason that said map included submerged lands adjacent to North Island and forming no part thereof, and consisting of 663 acres of submerged lands and 207.24 acres referred to as
182 meadow, marsh, and beach land, upon which were to be constructed, according to said Exhibit C, wharves, warehouses, docks, piers, and basins.

V.

The court erred in adjudging that the defendant in error, Coronado Beach Company, a corporation, was at the time of the commencement of this action, ever since has been, and now is, the sole and exclusive owner in fee simple of all and singular the tract of land described in said action, free and clear of any easement, estate, interest, title, claim, or demand of any character or description of plaintiff in error, in or to the same, or in or to any part or parcel thereof, for use for the defense or security of the Nation, or for any purpose whatsoever.

VI.

The court erred in adjudging that plaintiff in error had no easement, estate, interest, right, title, claim, or demand of any kind in or to the land described in the complaint for use for the defense or security of the Nation, or for any purpose whatsoever.

Now comes the plaintiff, within the time allowed by law and the stipulations of the parties hereto, and proposes and offers the foregoing, and the whole thereof, as plaintiff's engrossed bill of exceptions, containing a summary of all the evidence introduced in the case (except certain maps and diagrams, being plaintiff's Exhibits Nos. 10 and 11 and defendant's Exhibits B, C, D, E, and F, which exhibits by stipulations and order under subdivision 4, rule 8, of the Supreme Court, are transmitted to the clerk of the Supreme Court of the United States); the request for instructions submitted by the plaintiff to the court and denied by the court; the instructions given by the court to the jury and the specifications of errors of law

183 occurring at the trial; and that the same be ordered filed as a part of the record in this case.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff in Error.

It is hereby stipulated that neither plaintiff's Exhibits Nos. 10 and 11 nor the defendant's Exhibits B, C, D, E, and F, in this case need be attached to this bill of exceptions, nor inserted in the original transcripts in this case.

Dated August 9, 1920.

MORRISON, DUNN & BRODECK,
PETER F. DUNNE,
HERBERT W. CLARK,
READ G. DILWORTH,
JAS. E. WADHAM,
Attorneys for Defendant in Error.

I hereby certify the within and foregoing engrossed bill of exceptions to be a true and correct bill of exceptions, and that the same contains all the evidence introduced in the case (except certain maps and diagrams, being plaintiff's Exhibits Nos. 10 and 11, and defendant's exhibits B, C, D, E, and F, ordered to be transmitted to the clerk of the Supreme Court of the United States); the instructions given by the court, and the instructions requested by the plaintiff and refused by the court; together with the specifications of errors of law alleged by the plaintiff to have
184 occurred at the trial; and the same is hereby accordingly allowed and settled and ordered filed as a part of the record in this case.

Dated August 9th, 1920.

OSCAR A. TRIPPET,
Judge of the United States District Court.

185 (Endorsed:) No. E–34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Proposed bill of exceptions. Filed Jul. 8, 1920. Chas. N. Williams, clerk. Engrossed and filed Aug. 9, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

186 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, plaintiff,
vs.
THE CORONADO BEACH COMPANY, a corporation, claimant and defendant. } No. E-34.

Petition for writ of error.

Comes now the United States of America, plaintiff in error, and respectfully shows that the above-entitled cause is now pending in the United States District Court for the Southern District of California, Southern Division, and that judgment therein was rendered on the 1st day of June, 1920, and entered on the 1st day of June, 1920, in the United States District Court for the Southern District of California, Southern Division, in favor of the defendant in error, The Coronado Beach Company, a corporation, for the sum of five million dollars ($5,000,000.00); that the motion for a new trial of said cause was denied on said 1st day of June, 1920, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States, on writ of error.

Wherefore, the United States of America prays that a writ of error be issued in this behalf to the Supreme Court of the United States, and that the clerk of the United States District Court for the Southern District of California, Southern Division, be directed to send the records, proceedings and papers in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assign-
187 ment of errors herewith filed by the plaintiff in error may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

Dated at Los Angeles, California, this 9th day of Aug., 1920.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California;
Attorneys for Plaintiff in Error.

188 (Endorsed:) No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Petition for writ of error. Filed Aug. 9, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

189 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT AND DEFENDANT. } No. E-34.

Assignment of errors.

Now comes the United States of America, plaintiff in error in the above-entitled cause, and files the following assignment of errors:

I.

The United States District Court, Southern District of California, Southern Division, erred in denying the motion of the plaintiff in error for a new trial, for the reason that the verdict is against law.

II.

The said court erred in denying the motion of the plaintiff in error for a new trial, for the reason that it affirmatively appeared from the evidence that the evidence is insufficient to justify the verdict.

III.

The said court erred in denying the motion of the plaintiff in error for a new trial, because it affirmatively appears from the evidence that the verdict is against the weight of the evidence.

IV.

The said court erred in refusing to instruct the jury as requested by the plaintiff in error, as follows:

You are instructed that the State of California is the owner of all land bordering upon tide water within the State, which
190 is below the ordinary high-water mark. Therefore, the private ownership of land bordering upon tide water in this State can only extend to the ordinary high-water mark.

V.

The said court erred in instructing the jury as follows:

The land in question whose value you are to fix, and which has been described in the act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tide-

lands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the anchorage for ships, and the line of that anchorage is precisely defined by the United States survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence. Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation, and in this respect I instruct you that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed as it has been, beyond which a solid fill is not permissible without consent of the Government, and that it is likewise a reasonable public regulation that the pierhead line be fixed as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers, warehouses, terminals, or other improvements on these submerged lands, subject to these regulations, and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands. And you are further in-
191 structed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same were derived from the former Government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the Government by the survey and patent.

VI.

The said court erred in overruling the plaintiff's objection to, and admitting in evidence, a map offered by defendant, and filed in said cause as defendant's Exhibit C, for the reason that said map did not merely show the uses to which the land could be adapted, but was extended to speculative inquiries as to possible future uses, under circumstances which did not exist, and which in the future may never exist; and for the further reason that said map included submerged lands and other lands adjacent to North Island and forming no part thereof, and consisting of 663 acres of submerged lands, upon which were to be constructed, according to said Exhibit C, wharves, warehouses, docks, piers, and basins, and 207.24 acres lying above high-water mark and referred to as meadow, marsh, and beach land.

Wherefore, the plaintiff in error prays that the judgment rendered against the said plaintiff in error be reversed; that said district court be directed to enter a judgment that plaintiff in error is the

owner of an easement, estate, and interest in and to the land described in the complaint herein, for use of the same for the defense and security of the Nation; and that the defendant in error is the owner in fee simple of said land subject to such easement,
192 estate, and interest of said plaintiff in error; and that a new trial of said action be ordered to appraise the value of the interest of the defendant in error in said land; and for such other and further relief as to the court may seem proper in the premises.

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff in Error.

193 (Endorsed:) No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Assignment of errors. Filed Aug. 9, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy.

194 In the District Court of the United States for the Southern District of California, Southern Division.

Clerk's office.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant. } No. E-34.

Precipe for certified copy of record.

To the clerk of said court, sir:

Please issue a certified copy of the record in the above cause, consisting of the names and addresses of the attorneys;
Judgment roll, including complaint;
Answer;
Reply to answer;
Verdict and judgment;
Motion for a new trial;
Opinion or order denying new trial;
Bill of exceptions;
Petition for writ of error;
Assignment of errors;
Writ of error;
Citation on writ of error;
Precipe for transcript.

Said record to be certified under the hand of the clerk and the seal of the court.

Dated this 9th day of August, 1920.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff in Error.

195 (Endorsed:) No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Precipe for certified copy of record. Filed Aug. 9, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

Received a copy of the within precipe this 9th day of August, 1920.
MORRISON, DUNNE & BROBECK,
PETER L. DUNNE,
HERBERT W. CLARK,
READ G. DILWORTH,
JAMES E. WADHAM,
Attorneys for Defendant in Error.

196 In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. THE CORONADO BEACH COMPANY, A CORPORATION, defendant.	No. E-34.

Certificate of clerk United States District Court to transcript of record.

I, Chas. N. Williams, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing 195 typewritten pages, numbered from 1 to 195, inclusive, and comprised in one volume, to be a full, true and correct copy of the complaint, answer, reply to answer, verdict and judgment, motion for a new trial, order denying a new trial, bill of exceptions, petition for writ of error, assignment of errors, and precipe for transcript in the above and therein entitled cause, also the original citation on writ of error and the original writ of error; and that the same together constitute the record in

KING FOLDOUTS/EXHIBITS ARE TOO LARGE TO FILM

said cause as specified in the said præcipe filed in my office on behalf of the plaintiff in error by his attorney of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America in and for the Southern District of California, Southern Division, on this 13th day of August, in the year of our Lord one thousand nine hundred and twenty, and of our Independence the one hundred and forty-fifth.

[SEAL.] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America in and for the Southern District of California.
By R. S. ZIMMERMAN,
Deputy Clerk.

197 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant. No. E–34.

Stipulation.

It is hereby stipulated that a photographic copy of plat of the island or peninsula of San Diego, as surveyed under instructions from the U. S. Surveyor General by Henry Hancock, deputy surveyor, in June and July, 1867, and approved June 11th, 1869, by Jos. S. Wilson, commissioner of the General Land Office, a photographic copy of which said plat is hereto attached and made a part of this stipulation, may be made a part of the record in the proceedings on writ of error herein.

Dated September 21st 1920.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff.
MORRISON, DUNNE & BROBECK,
PETER F. DUNNE,
HERBERT W. CLARK,
READ G. DILWORTH,
JAS. E. WADHAM,
Attorneys for Defendant.

(Here follows photograph marked p. 198.)

(Endorsed:) No. E–34. In the Supreme Court of the United States. United States of America, plaintiff, *vs.* The Coronado Beach

Company, defendant. Stipulation. Received Sept. 29, 1920. Office of the clerk, Supreme Court, U. S.

(Endorsed:) File No. 27881. Supreme Court, U. S. October term, 1920. Term No. 524. The United States, Pl'ff in Error, vs. The Coronado Beach Company. Stipulation and addition to record. Filed Sept. 29, 1920.

(Indorsement on cover:) File No. 27881. S. California, D. C. U. S. Term No. 524. The United States of America, plaintiff in error, vs. The Coronado Beach Company. Filed September 2d, 1920. File No. 27881.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, *Plaintiff in Error,* *v.* CORONADO BEACH COMPANY.	No. 524.

THE UNITED STATES OF AMERICA, *Appellant,* *v.* CORONADO BEACH COMPANY.	No. 525.

IN ERROR TO AND APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the United States, plaintiff in error and appellant in the above-entitled cases, and moves the court to advance said cases for argument *together* at an early date convenient to the court during the present term.

The United States brought suit to condemn North Island in San Diego Harbor, California, for use as an aviation site for the Army and Navy.

20099—20

The property involved was patented to the predecessors in title of the Coronado Beach Company by the United States under a confirmation of a Mexican grant. Under the Mexican law in grants of this kind there was a reservation to the Government of the right to make use of any portion of such lands for the purpose of constructing warehouses, arsenals, and other public edifices, if necessary, for the security or defense of the nation. It is asserted by the United States that that reservation is enforceable by the United States and that the Coronado Beach Company holds the land burdened with that reservation.

The record on appeal (No. 525) presents that question, decided adversely to the Government by the District Court.

The case on writ of error (No. 524) brings up for review the case on the law side, the trial of which resulted in an award by the jury and a judgment by the court of $5,000,000.00 as the value of the land. Error is asserted in the admission of certain evidence and in a ruling that certain submerged or tide lands were properly a part of North Island and that the company should have compensation therefor.

The Act of Congress authorizing condemnation (Act of July 27, 1917, ch. 42, 40 Stat. 247, 248) provided for a direct appeal to this court. It also provided that interest should be allowed on the award at the rate of 6 per cent from the time of

taking possession. The United States took possession on August 1, 1917. Up to date the interest on the award amounts to about $1,000,000—it is running at the rate of $25,000 per month.

Notice of this motion has been served upon opposing counsel.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

NOVEMBER, 1920.

○

FILE COPY

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JAMES D. MAHER,
CLERK

No. 524.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,
v.
CORONADO BEACH COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921

INDEX.

	Page.
STATEMENT	1
ASSIGNMENT OF ERRORS	6
ARGUMENT	8
I. The defendant Coronado Beach Company does not privately own by grant from Mexico the tide lands fronting the upland of North Island, but these tide lands belong to the State of California as a part of its sovereignty	8
1. Defendant does not privately own lands below ordinary high-water mark	8
2. Rule of Spanish and Mexican law as to the sea and its shores	11
3. The effect of the (*a*) Decree, and (*b*) Patent	16
(*a*) Decree	19
(*b*) Patent	26
In discussing the effect of the patent we submit: first, considered from its four corners together with the plat and survey to which it refers, it does not cover the lands below high water mark; and second, even though it could be construed to embrace such lands, it is void as to them	26
II. At most, defendant company's right, title, or interest, if any, in the lands below high-water mark are subject to the paramount servitudes and powers of the federal and state governments to protect navigation, commerce, and fishery	46
III. In any event, Congress did not authorize by the act of July 27, 1917, condemnation of the tide lands	54
IV. Because the United States was entitled to have the 1,232.92 acres of land lying above high-water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon, the case should be reversed and remanded	59

CITATIONS.

Statutes.

Act of September 9, 1850, 9 Stat. 452	25
Act of March 3, 1851, 9 Stat. 631	10, 14, 21, 22, 24, 38, 49
Act of August 31, 1852, 10 Stat. 76	24
Act of March 3, 1853, 10 Stat. 244, c. 143	23
Act of March 3, 1853, 10 Stat. 244, c. 145	23, 24

Page.

Act of June 14, 1860, 12 Stat. 33 24
Act of July 1, 1864, 13 Stat. 332 24
Act of July 23, 1866, 14 Stat. 220 24
Act of March 4, 1915, 38 Stat. 1064 55
Act of July 27, 1917, 40 Stat. 247 ..... 1, 7, 18

Cases.

Barker v. *Harvey*, 181 U. S. 481 22
Binns v. *United States*, 194 U. S. 486 ..... 58, 59
Boom Co. v. *Patterson*, 98 U. S. 403 67
Boquillas Cattle Co. v. *Curtis*, 213 U. S. 339 39
Boston Chamber of Commerce v. *Boston*, 1217 U. S. 189 ..... 53, 66
Botiller v. *Dominguez*, 130 U. S. 238 23
Brown v. *Brackett*, 21 Wall. 387 20
Burfenning v. *Chicago &c. Ry. Co.*, 163 U. S. 321 42
Chicago, B. &c. R. Co. v. *Chicago*, 166 U. S., 226 67
Cummings v. *Chicago*, 188 U. S. 410 50
Doolan v. *Carr*, 125 U. S. 618 ..... 41, 42
Duplex Ptg. Co. v. *Deering*, decided Jan. 3, 1921 59
Ellicott v. *Pearl*, 10 Pet. 411 ..... 31, 32
Goodtitle v. *Kibbe*, 9 How. 470 17
Greenleaf Lbr. Co. v. *Garrison*, 237 U. S. 251 47
Heath v. *Wallace*, 138 U. S. 573 .....
Henshaw v. *Bissell*, 18 Wall. 255 21
Iowa v. *Rood*, 187 U. S. 87 ..... 40, 45
Jover v. *Insular Government*, 221 U. S. 623 12
Kentucky v. *Powers*, 201 U. S. 1 24
Knight v. *Land Ass'n*, 142 U. S. 161 ..... 12, 16, 42
Los Angeles Milling Co. v. *Los Angeles*, 217 U. S. 217 ..... 8, 49
Mann v. *Tacoma Land Co.*, 153 U. S. 273 22
Muse v. *Arlington Hotel Co.*, 68 Fed. 637 33
Newhall v. *Sanger*, 92 U. S. 761 22
Packer v. *Bird*, 137 U. S. 661 ..... 17, 20
People v. *California Fish Co.*, 166 Calif. 576 ..... 49, 50
Salt Lake Inv. Co. v. *Oregon Short Line*, 246 U. S. 446 ..... 43, 44
San Francisco v. *Le Roy*, 138 U. S. 671 12
Scull v. *United States*, 98 U. S. 410 34
Scranton v. *Wheeler*, 179 U. S. 141 49
Shively v. *Bowlby*, 152 U. S. 1 ..... 15, 16, 17
Smith, Ex parte, 94 U. S. 455 24
United States v. *Breward*, 16 Pet. 143 31
United States v. *Cambuston*, 20 How. 59 13
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 ..... 48, 53, 67
United States v. *Coca Cola Co.*, 241 U. S. 265 59
United States v. *Cress*, 243 U. S. 316 50
United States v. *Fossatt*, 21 How. 445 22
United States v. *Hanson*, 16 Pet. 200 31
United States v. *Lawton*, 5 How. 10 33
United States v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310 59

	Page.
United States v. *Santa Fe*, 165 U. S. 675	25
United States v. *Simmons*, No. 224, December Term, 1863	15
United States v. *Stone*, 2 Wall. 525	41
Weber v. *Harbor Com'rs*, 18 Wall. 57	16
West Chicago Railroad v. *Chicago*, 201 U. S. 506	47
Whitney v. *United States*, 181 U. S. 104	13
Winter v. *United States*, 30 Fed. Cas. 350	31, 32
Miscellaneous.	
Cong. Rec., 65th Cong., 1st sess., vol. 55, p. 5434	58
Hall's Mexican Laws (ed. 1885), pp. 147, 149, 446	11, 12, 13
H. Doc. 1946, 64th Cong., 2d sess., vol. 32	56, 57
H. R. 88, 65th Cong., 1st sess., vol 1	56
Moreau & Carleton's Partidas (ed. 1820), vol. 1	11, 14
Sen. Rep. 83, 65th Cong., 1st sess., vol. 55, p. 5100	55
White's New Recopilacion, vol. 1	11

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
v.
CORONADO BEACH COMPANY.
No. 524.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This writ of error is brought by the United States to review the judgment of the District Court of the United States for the southern district of California, southern division, entered upon the verdict of a jury awarding defendant Coronado Beach Company the sum of $5,000,000 as the fair market value of the property known as North Island in the harbor of San Diego, California.

These proceedings were brought under authority of the Act of July 27, 1917, c. 42, 40 Stat. 247,[1]

[1] CHAP. 42. An act authorizing the President to take possession, on behalf of the United States, for use as sites for permanent aviation stations for the Army and Navy and for

which authorized the President to take possession forthwith for national defense and as sites for permanent aviation stations for the Army and Navy, of the whole of North Island in the harbor of San Diego, California, and the Attorney General or the claimants of North Island to make "application for the determination and appraisement of any rights private parties may have in the said island over and beyond any rights thereto in the United States to the District Court of the United States for the southern district of California." The Act further provided that proceedings be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use, and for direct appeal to the Supreme Court of the United States within ninety days after the judgment was rendered, and for the distribution of the amount of

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aviation school purposes, of the whole of North Island in the harbor of San Diego, California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to cause possession to be taken forthwith, on behalf of the United States, for use for national defense and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes, of the whole of North Island, in the harbor of San Diego, California, and the provisions of section three hundred and fifty-five, Revised Statutes, shall not apply to the expenditure of any appropriations for improvements thereon for aviation purposes.

The Attorney General or the claimants to the said North Island are authorized to make application for the determination and appraisement of any rights private parties may have in the said island over and beyond any rights thereto in the United States to the District Court of the United States for

the award to private owners "as their respective interests may be determined by the court."

The bill of complaint was filed in equity (see R. 525), and alleged that the United States had an easement or interest in the land, asked that defendant Coronado Beach Company be required to set up its claim but that the same be adjudged to be subordinate to the rights and interests of the United States for purposes of national defense, and that the company be enjoined from claiming or asserting any right, title or interest in said land adverse to and in conflict with the rights of the United States. R. 1.

Upon the answer of defendant (see R. 525, p. 4, denying that the United States was the owner of

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the Southern District of California; the proceedings to be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use. Either party may take an appeal from the judgment of such court direct to the Supreme Court of the United States within ninety days after such judgment is rendered. Upon the final ascertainment of the value of any right, title or interest adjudged to be in any private claimants to the said island there shall be paid into court the value of the same as so determined, together with interest thereon at the rate of six per centum per annum from date possession thereof was taken as herein authorized; and thereupon the United States shall be vested with title to said lands. The amount so paid shall be distributed by order of the court to the owner or owners of such right, title or interest in said island as their respective interests may be determined by the court. The amount necessary to pay the awards in favor of private claimants is hereby appropriated out of any money in the Treasury not otherwise specifically appropriated, to be disbursed under orders of the Secretary of War.

Approved, July 27, 1917.

any interest in the land described and asserting that the company was the sole owner thereof, and that its value was $7,500,000, the court entered a decree (see R. 525, p. 15) that defendant Coronado Beach Company was the sole and exclusive owner in fee simple absolute of all the lands described in the bill of complaint as the whole of North Island (R. 40), and thereupon the United States made application to transfer the case to the law side of the court for the purpose of determining and appraising the rights of defendant.

The case was submitted to a jury under the instructions of the court and the jury returned a verdict that the fair market value of the whole of North Island as of August 1, 1917, was $5,000,000. R. 106. The court also submitted to the jury special interrogatories: (1) as to the fair market value on August 1, 1917, of the land lying above high water mark, containing 1,232.93 acres more or less, referred to as mesa land, to which the jury returned a verdict that the market value of such land was $4,625,000; (2) as to the fair market value on August 1, 1917, of 207.24 acres of marsh land which the verdict of the jury valued at $45,000; and (3) as to the fair market value on August 1, 1917, of the lands lying below high water mark consisting of 663.3 acres, referred to as tide or submerged lands, which by the verdict of the jury were valued at $330,000.

During the trial plaintiff excepted to the ruling of the court on the admission of a certain map (Exhibit

D, R. 47),[1] and of evidence tending to establish the fair market value of the mesa or fast land (R. 48) and the lands lying below high water mark, as being together privately owned by defendant company; and also excepted to the instructions of the court to the effect that the ownership of defendant company extended out over the tide lands and submerged lands to the anchorage of ships, and that such private title to both mesa or fast lands and to the tide or submerged lands was derived from the Mexican government. R. 105.

Plaintiff requested the court to instruct the jury that the State of California is the owner of all land bordering on tidal waters within the state which is ordinarily below high water mark, and that private ownership of land bordering on tidal waters in that state can only extend to the ordinary high water mark, which requested instructions the court refused and plaintiff excepted thereto. R. 105.

The bill of exceptions (R. 24) embodies all of the evidence in the case (R. 24 to 99), and the exceptions saved at the trial; instructions to the jury (R. 100); exceptions to the instruction of the court (R. 104); verdict of the jury and answers to special interrogatories directed by the court (R. 106), and specifications of error of law occurring at the trial. R. 107–109.

[1] This exhibit is erroneously referred to in the assignment of errors as Exhibit C.

ASSIGNMENT OF ERRORS.

(R. 111.)

1. Error in denying a motion for a new trial because the verdict is against the law.

2. Error in denying a motion for a new trial because the evidence is insufficient to justify the verdict.

3. Error in denying a motion for a new trial because the verdict is against the weight of the evidence.

4. Error in refusing to instruct the jury that the State of California is the owner of all land bordering upon tide water within the State below ordinary high water mark, and that the private ownership of land bordering on tidal water therein can only extend to the ordinary high water mark.

5. Error in instructing the jury to the effect that the whole of North Island, as described in the Act of Congress, included not only the upland but the tide lands, that the ownership of defendant company does not stop at the line of ordinary high tide but extends out to the anchorage for ships, comprising 663 acres of tide lands in which defendant company had all the rights of full ownership, and that title to these tide lands was derived by defendant company from the Mexican government and is conclusively established and defined as against the United States by survey and patent.

6. Error in admitting in evidence the map offered by defendant company, filed as Exhibit C, for the reason that the map showed speculative uses of the property under circumstances which did not

exist and which might never exist, and included submerged and other lands adjacent to North Island, forming no part thereof, upon which were to be constructed wharves, warehouses, docks, piers and basins, and of 207.24 acres of marsh land lying above ordinary high water mark.

Under these assignments plaintiff in error submits the following propositions:

1. The defendant Coronado Beach Company does not privately own by grant from Mexico the tide lands fronting the upland of North Island, but these tide lands belong to the State of California as a part of its sovereignty.

2. At most, defendant company's right, title or interest, if any, in the lands below high water mark are subject to the paramount servitudes and powers of the federal and state governments to protect navigation, commerce, and fishery.

3. In any event, Congress did not authorize by the Act of July 27, 1917, condemnation of the tide lands.

4. Because the United States was entitled to have the 1232.92 acres of land lying above high water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon, the case should be reversed and remanded.

ARGUMENT.

I.

The defendant Coronado Beach Company does not privately own by grant from Mexico the tide lands fronting the upland of North Island, but these tide lands belong to the State of California as a part of its sovereignty.

1. *Defendant does not privately own lands below ordinary high water mark.*

By reference to the maps filed as exhibits with these proceedings it will be observed that the lands below high water mark are tide lands between ordinary high water mark and low water mark, and submerged lands between ordinary low water mark and the line which is termed anchorage for ships. These submerged lands are apparently covered by water in some places fifteen feet deep, but in this brief the terms "tide lands" and "submerged lands" will be used indiscriminately to denote lands below ordinary high water mark.

Defendant deraigned title by grant from Mexico to one Carrillo, a native of California, who on April 21, 1846 (R. 25), "being in want of a proper land for the breeding of cattle, both large and small, and horses, and desirous of encouraging these (kinds of) property, he names a vacant land in the limits of this port, on the southern part, known by the name of 'La Isla,' or peninsula, which the port of San Diego forms: The which contains a little more or less, two leagues or 'siteos,' according to the map which he transmits, said land being fit for a

cattle farm, for which purpose he asks for it, and is bounded on the north by the 'Estero' Creek of same port, east by the place of Don Aguitino Meliso, south by the sea, and west by the bay and ship anchorage."

The Governor of the Territory of California, Pio Pico, entered an order (R. 26) directing title to be issued to Carrillo, which declared him "owner in fee of the land known or named 'Isla,' or peninsula, in the port of San Diego towards the part of ——— of the anchorage." Patent was issued by the Governor May 15, 1846 (R. 27), containing the following conditions and description:

> 1. He may enclose it without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use or cultivation of it as may best suit him.
>
> 2. He shall request the proper magistrate to give him juridical possession in virtue of this order, by whom the boundaries will be marked out.
>
> 3. The land of which donation is made is two square leagues, and is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the rancho of San Augustin Melisse, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance.

On April 20, 1852, Billings and others (R. 28) petitioned the Commissioners to Settle Private Land

Claims in California, appointed under the Act of March 3, 1851, c. 41, 9 Stat. 631, for confirmation to them as successors in title to Carrillo of the title to—

> the island or peninsula of San Diego, situate in the present county of San Diego, containing two square leagues, with the boundaries described in the grant, a copy of which is submitted herewith marked A with a translation marked B.
>
> * * * * *
>
> And the petitioners further show that the said land has not been surveyed by the Surveyor General of the United States, such survey, from the nature of the case being unnecessary, the boundaries being natural, and not to be mistaken.

The Land Commissioners rejected the claim (R. 32) and upon appeal to the United States District Court for the southern district of California, the decision of the Commissioners was reversed (R. 33), the court decreeing—

> that the title of the appellants, Frederick Billings and others, to the lands claimed by them, as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.
>
> The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the "Island

> or peninsula of San Diego," is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego toward the town, east by the end of the ranch of Augustin Melijo, south by the sea, and west by the anchorage for ships, according to the documents of title and map to which reference is had.

From this decree the United States appealed to the Supreme Court, but on motion of the Attorney General the appeal was dismissed at the December term, 1863. R. 10 (R. 525, p. 37).

The survey of the land made by the United States Surveyor General for California in 1867 was approved June 11, 1869, and patent in accordance therewith that day issued. R. 36–38. The surveyor in running the line of this survey extended the western boundary beyond the ordinary high-water mark and to embrace 663 acres of submerged lands and tide lands below ordinary high-water mark.

2. *Rule of Spanish and Mexican law as to the sea and its shores.*

The sea and its shores are treated by these laws as being *bienes communes* incapable of private ownership.

> Moreau & Carleton's Partidas (ed. 1820), vol. 1, tit. 28, pp. 334–7.
>
> White's New Recopilacion (ed. 1839), vol. 1, p. 46; vol. 1, Book 2, p. 70.
>
> Hall's Mexican Laws (ed. 1885), c. IV, §§ 1463–1471, pp. 446–9.
>
> § 1465. * * * every man may enjoy the use of the sea and its shores, either for the

purpose of fishing or navigation, or doing there whatever else he may conceive advantageous to him. * * *

§ 1466. * * * And by the sea shore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

§ 1468. Rivers, ports and public roads belong to all men in common.

The rule of the civil law that lands covered by the tides at their highest flood during the year has not, however, been applied to that portion of the country ceded to the United States by Mexico, the rule being that to constitute such lands tide lands there must be such regularity of flow over them every twenty-four hours as to render them unfit for the uses to which the upland is applied, *San Francisco* v. *Le Roy*, 138 U. S. 671, concurring opinion, *Knight* v. *Land Ass'n*, 142 U. S. 161, 214.

While it may be that the crown or the congress of Mexico could for the common benefit limit the general rule of the civil law and grant the sea shore for appropriate purposes, *Jover* v. *Insular Government*, 221 U. S. 623, 629, the grant under which defendant company claims in this case, as we have seen, was under the law of August 18, 1824, for the colonization of territories of the republic. Hall's Mexican Laws, p. 147, and the General Rules and Regulations for the colonization of territories of November 21, 1828, Jb., p. 149.

For convenience copies of this law and these rules and regulations are printed as an appendix to this brief.

Under this law there is no presumption of any power in the territorial governor of California to make a grant of the lands below ordinary high water mark. Authority to make these grants and the terms and conditions thereof are prescribed by these laws, and the court must look to them both for the power to make the grant and for the mode and manner of its exercise, *Whitney* v. *United States*, 181 U. S. 104, 113; *United States* v. *Cambuston*, 20 How. 59, 63.

No authority in the governor of the territory to grant lands below ordinary high water mark, therefore, is presumed, and none is or can be shown under the applicable Mexican statutes.

The Mexican patent not only does not contain an express grant of the tide lands or submerged lands, but provides that any inclosures of the land granted shall not prejudice any crossings, roads and servitudes which existed under the Mexican laws. Hall's Mexican Laws, §1468, p. 448, after providing that rivers, ports and public roads belong to all men in common, says:

> And though the dominion or property (senorio) of the banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow there, or to refit his vessel, or to put his sails or merchandise there. So fishermen may put and

> expose their fish for sale there, and dry their nets or make use of the banks for all like purposes which appertain to the art of trade by which they live.

See also Moreau & Carleton's Partidas (ed. 1820), vol. 1, tit. 28, law 6.

This would seem to be an express recognition in the patent that these lands granted on navigable waters were subject to the servitudes usual in such grants under Mexican laws and negatives the idea that the patent contained any express grant of the title below ordinary high water mark.

Carrillo's petition for patent (R. 25) described the west boundary (the one in question) as on the "west by the bay and ship anchorage." The order of the governor directing the issue of patent gives the boundary as "the land known or named 'Isla' or peninsula, in the port of San Diego towards the part of — of the anchorage." The Mexican patent describes the boundary as "west by the bay or anchorage for ships, as explained by the map which goes with the espediente." R. 27.

The petition to the land commissioners shows that the land had not been surveyed by the surveyor general (which was only necessary in order that patent might issue on confirmed claims under § 13 of the Act of March 3, 1851, 9 Stat. 631), because "such survey from the nature of the case being unnecessary, the boundaries being natural and not to be mistaken."

The map filed with the espediente, as set out in the Mexican patent, is not in the record in this case

and seems not to have been produced at the trial. A certified copy thereof from the Land Office is attached to this brief as an appendix, and a copy will also be found in the records of this court in the case of *United States* v. *Simmons*, No. 224 at the December term, 1863. From this map, which the Mexican regulations of 1828 required an applicant for a donation of vacant land to file, it is evident that the shore line on the west is meandered and none of the bay is included, and makes clear that the boundary given in the Mexican patent and in the petition therefor as the "bay or anchorage for ships," or "bay and ship anchorage," is but a description of the navigable body of water which forms the west boundary of the donation. Billings and others who petitioned the land commissioners for a confirmation of the grant fully recognized this when they asserted that the boundaries were natural and not to be mistaken, and a survey of the land, in order to segregate it from other land, was unnecessary.

That a Mexican grant bounded by the bay on navigable waters adjacent does not extend over the submerged lands or tide lands below ordinary high water mark is too well settled for argument. The language of this court in *Shively* v. *Bowlby*, 152 U. S. 1, 29, is conclusive:

> In *United States* v. *Pacheco*, it was decided that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of Congress, of land bounded "by the bay" of San Francisco, did

not include land below ordinary high water mark of the bay; because, as was said by Mr. Justice Field, in delivering judgment, "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican government, the result will be equally against the position of the appellants." 2 Wall. 590.

3. *The effect of the* (*a*) *Decree and* (*b*) *Patent.*

When California became a part of the territory of the United States, unless there had been previous to that time an express grant by the Mexican government of lands below ordinary high water mark, *Shively* v. *Bowlby, supra*, pp. 13, 47, such lands were held in trust by the United States for the benefit of the future state. *Weber* v. *Harbor Com'rs*, 18 Wall. 57, 65, 66; *Shively* v. *Bowlby, supra; Knight* v. *Land Ass'n*, 142 U. S. 183.

While California was a territory of the United States, although Congress had *power* to grant *for appropriate purposes* titles or rights in soil below ordinary high water mark of tide waters, it has never done so by general laws and has adopted the policy

of leaving the disposition of sovereign rights in navigable waters and in the soil under them, to the control of the States when admitted to the Union, *Shively* v. *Bowlby*, *supra*, pp. 47, 58.

It is settled law, moreover, that when California was admitted to the Union September 9, 1850, she acquired absolute property and dominion over the soils under tide water within her jurisdiction. *Shively* v. *Bowlby*, *supra*; *Knight* v. *Land Ass'n*, *supra*, p. 183, and cases there cited.

While, therefore, Congress might have expressly granted or confirmed an imperfect Spanish grant of tide lands below ordinary high water mark while California was a territory, it had no such power after California became a State. *Goodtitle* v. *Kibbe*, 9 How. 470, 478; *Packer* v. *Bird*, 137 U. S. 661.

The inquiry is then, whether there was an express grant of these tide lands either by Mexico or Congress before California became a state. We have already shown that there was no authorization under the territorial colonization law of Mexico of 1824, subject to and in conformity with which the Mexican patent issued, for the territorial governor to grant lands below ordinary high water mark, tide lands or submerged lands, and that neither the Mexican patent nor the map therewith purported to cover any but the fast lands. We have further shown that there was no law of Congress granting lands below ordinary high water mark in California before her admission as a state. Moreover, the decree of the District Court (R. 33) confirming the claim of Billings and others did not

even purport to confirm a claim to any property other than that described in the petition and the documentary and other evidence in the case. It did not confirm the title to any land other than fast land described by natural bounds and according to the documents of title and map to which reference was had; that is to say, by descriptive language which according to all admissible rules of conveyancing would exclude adjacent lands lying below the line of high tide.

In the light of these facts we come to consider the effect of the survey of 1869 which embraces these lands. The court below held (see R. 525, p. 22) that the decree of the United States District Court for the southern district of California, confirming the Mexican grant and the patent issued by the land department in conformity with the plat of survey made by the surveyor general embracing these lands below ordinary high water mark, was conclusive on the United States, and, in effect, that even though there was error on the part of the land department in surveying and patenting the tide lands and submerged lands, its action could not be assailed in this proceeding.

Under the provision of the Act of July 27, 1917, in accordance with which this suit was brought to determine and appraise "any rights private parties may have in the said island over and beyond any rights thereto in the United States," and the provision empowering the court to distribute the award to private owners as their respective interests may be determined by the court, it may well be

contended that Congress thus authorized in this proceeding a direct attack upon the validity of the patent if in determining the rights of parties such direct attack should be necessary. Indeed, it will be remembered that the United States first invoked the equitable powers of the court (see R. 525) to determine the rights of parties, and in that proceeding a direct attack could be made and was to be made upon the patent.

We do not, however, rest the right to attack the patent in so far as it covers tidelands upon the sole proposition that this suit to determine the right of the parties is a direct attack upon the patent. We base it upon the broader ground that the lands in question in this case, below ordinary high water mark, were never within the jurisdiction of the Mexican governor of the territory of California to grant, were never granted in the Mexican patent, were never within the jurisdiction of the commissioners to settle private land claims in California, nor of the United States District Court in the proceedings confirming the Mexican grant, were never within the jurisdiction of the land department and were not subject to grant by it, and that the patent therefor is not merely voidable but is void, which facts can be shown in an action at law.

(a) DECREE.

Before discussing the jurisdiction of the land department we will advert to the ruling of the court that a decree of the United States District Court confirming the Mexican grant is conclusive in this proceeding.

In this decree (R. 33) it is adjudged that the title of the claimants "to the lands claimed by them, as set forth and described in their petition * * * is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed," and the boundary of the land in question is given "and west by the anchorage for ships according to the documents of title and map to which reference is had." No claim was specifically made in the petition for the extension of the grant to lands below high water mark. On the contrary, the petition alleges that the boundaries of the land were natural, and not to be mistaken, and that a survey thereof is unnecessary.

The question whether the grant embraced lands below high water mark, therefore, was never presented to the court, and no right to them was ever in the minds of the claimants at the time their petition was rejected by the land commissioners nor at the time it was confirmed by the court. It follows that translation of title to these tidelands can not be based upon this decree because the claim confirmed in terms does not embrace them. *Packer* v. *Bird*, 137 U. S. 661, 672.

The decree of confirmation is limited to the extent of the claim made and covered and protected nothing beyond. *Brown* v. *Brackett*, 21 Wall. 387. It merely established the validity of the claim as it then existed, it did not change the character of the grant.

As was said in *Henshaw* v. *Bissell*, 18 Wall. 255, 264, Mr. Justice Field speaking for the court in a case of conflicting patents:

> The protection which by the treaty the United States promised to the grantees extended to rights which they then held. The confirmation established the validity of the claims of the parties as they then existed; that is, it determined that their claims were founded upon concessions of the former government, which were genuine and entitled to recognition as far as they did not interfere with previously existing rights of others, which the government was also bound to respect. Confirmation established nothing more.

The decree of the District Court reversing the rejection of the Mexican grant by the land commissioners and confirming the grant, can not be extended to cover any class of property which was not included in the original grant. While, as has been shown, this decree can not properly be construed as even attempting to confirm title to property not included in the original grant, it is insisted that *even if it purported* to cover the submerged lands fronting the uplands covered by the Mexican grant, the special tribunal created by the Act of March 3, 1851, 9 Stat. 631, to determine the validity of claims to private grants made by the Mexican government, had no jurisdiction to determine the validity of claims to submerged lands. It is true authority was conferred on this tribunal to determine the acreage of quantity grants and the boundary of

definite claims. *United States* v. *Fossatt*, 21 How. 445, 449. But this authority was limited to lands which, in case claims thereto were rejected by the Commission or were nor presented within two years from the passage of the Act, would then be "deemed, held and considered as a part of the public domain of the United States." This is made apparent when we consider section 13 of the Act, which provides in part:

> That *all* lands, the claims to which have been finally rejected * * * or which shall be finally decided to be invalid * * * and *all* lands, the claims to which shall not have been presented * * * within two years * * * shall be deemed, held and considered *as a part of the public domain of the United States.* [Italics ours.]

The words "public domain" used here mean "public lands" which are subject to sale and disposition under the general land laws. *Newhall* v. *Sanger*, 92 U. S. 761; *Barker* v. *Harvey*, 181 U. S. 481, 490; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284.

In *Newhall* v. *Sanger*, the Supreme Court in holding that the term "public lands" as used in the legislation of Congress meant such lands as are subject to sale or other disposition under general laws, was considering the effect of the Act of March 3, 1851, and especially whether valid claims could be initiated to lands *sub judice* under that Act prior to March 3, 1853, even though the Mexican grant thereto should be false and fraudulent and should thereafter be rejected. The court pointed out that no right of pre-

emption previously attached to lands in California before the passage of the Act of March 3, 1853, c. 145, 10 Stat. 244, 246, § 6, and that the legislation of Congress (page 764) "was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time, or rejected." But the Act of March 3, 1853, c. 143, 10 Stat. 244, conferred upon a settler on lands theretofore reserved on account of claims under foreign grants then or thereafter declared invalid, the rights granted by the preemption law after such lands should be released from reservation, "a class of lands which, from an early day, it had been the policy to reserve until the adjustment of all such claims." Page 765.

The object of the creation of the special tribunal to settle private grants in California was to segregate them from the "public domain," and thus open up a vast area of that domain in California to settlement under the homestead and preemption laws. As shown above, settlement under these laws had been held up by Congress in order that the valid private grants, which by the treaty and the law of nations the United States was bound to respect, might be definitely located.

As was said in *Botiller* v. *Dominguez*, 130 U. S. 238, 249, "the main purpose of the statute was to separate and distinguish the lands which *the United States owned as property*, which could be sold to others [Italics ours] * * * from those lands which be-

longed * * * to private parties" under Spanish or Mexican title. "When this was done the aim of the statute was attained. The order of the commissioners * * * enabled the government of the United States out of all its vast domain to say 'this is my property,' and also enabled the claimant, * * * who had a just claim * * * to say 'this is mine.' "[1]

There are no presumptions in favor of the jurisdiction of the courts of the United States, *Ex parte Smith*, 94 U. S. 455, and the subordinate judicial tribunals of the United States can exercise only such jurisdiction as may be authorized by Act of Congress, *Kentucky* v. *Powers*, 201 U. S. 1. *A fortiori*, there was no presumption in favor of the jurisdiction of this special tribunal, and we must look to the Act creating it to determine its jurisdiction and to ascertain whether the power sought to be exercised is lawful.

[1] The following statutory provisions show the purpose of Congress to facilitate the definite location, survey and settlement of public lands in California: Act of March 3, 1851, c. 41, 9 Stat. 631, §13, providing for survey after confirmation; Act of August 31, 1852, c. 108, 10 Stat. 76, 91, directed surveys of certain unconfirmed claims; Act of March 3, 1853, c. 145, 10 Stat. 245, §3, directed survey of private claims so far as necessary to complete surveys of public lands; Act of June 14, 1860, c. 128, 12 Stat. 33, which authorized the courts to adjudicate and settle surveys. This was later repealed by Act of July 1, 1864, c. 194, 13 Stat. 332, and the Land Office clothed with power to approve and correct surveys. Act of July 23, 1866, c. 219, 14 Stat. 220, §8, directed the Surveyor General, in cases where claimants neglected to request a survey, to extend the lines of the public surveys over such Spanish or Mexican claims.

United States v. *Santa Fe*, 165 U. S. 675, 714. This being true, the jurisdiction of this tribunal to extinguish the sovereign rights of California in its presumptive title to all its submerged lands will not be presumed but must clearly appear. It must be remembered that at the time Congress created this special tribunal California was a sovereign State of the Union, with full dominion and sovereignty over the lands within the state below ordinary high water mark. Indeed, the California Enabling Act of September 9, 1850, c. 50, 9 Stat. 452, 453, provides specifically that "all the navigable waters within the said state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States."

It is respectfully submitted that it was not the purpose of Congress to submit to this special tribunal the right to extinguish this presumptive title in the state of California to the submerged lands within her jurisdiction, nor to compel her in all cases to submit her sovereignty to the jurisdiction of these land commissioners.

The declaration of the Act creating this tribunal that *all* the lands to which claims are rejected, and to which claims are not seasonably presented, shall be deemed, held and considered as a part of the public domain of the United States, would seem to expressly limit the jurisdiction of the tribunal so that it does not extend to that class of lands which, if claims thereto are rejected, must be deemed, held and considered not as a part of the public domain of

the United States but as a part of the lands under the sovereignty and dominion of the State of California.

In this connection there is no reported case, so far as we have been able to discover, where the land commissioners of California passed upon the claim of a private grantee to full ownership and control of lands below ordinary high water mark.

(b) PATENT.

> In discussing the effect of the patent we submit: first, considered from its four corners, together with the survey and plat to which it refers, it does not cover the lands below high water mark; and second, even though it could be construed to embrace such lands, it is void as to them.

The plat of the survey which is attached to the record was introduced in evidence in the case, but the field notes were not. A certified copy of these field notes from the General Land Office has been filed with the clerk of this court, and extracts therefrom are printed as an appendix to this brief. These field notes form part of the survey and are to be considered with the plat to which they relate. *Heath* v. *Wallace*, 138 U. S. 573, 583.

In the patent (R. 37) the text of the decree of confirmation is set out, describing the land as "the island or peninsula of San Diego," and its western boundary as "west by the anchorage for ships according to the document of title and maps to which reference is had." After referring to the plat of survey

the land granted was described as "the tract of land embraced and described in the foregoing survey."

The decree of confirmation and the patent both speak of the land granted as an island or peninsula. These words have a well-known and generally understood meaning, the former as land entirely surrounded by water, and the latter as land nearly surrounded by water and connected with a larger body by a neck or isthmus. There is nothing in the Mexican patent, the petition for confirmation, the decree of confirmation, or the terms of the patent from the United States, to disclose that any lands covered by water were included or intended to be included in the grant, but by examining the plat of survey it is observed that the surveyor general has run, on the western boundary, two lines, one meandering ordinary high water mark on the shore, and expressly noted as such on the plat, and the other out to the deep channel used by ships in entering and leaving the harbor, and at one point on line No. 21 beyond the center of the bay of San Diego. It was held by the court below that, by this action of the surveyor general and the patent issued in conformity with the survey, the submerged land between the line of ordinary high water mark shown on the plat between stations 19 and 27, and the line shown on the plat as Nos. 19, 20, 21 and 22, was privately owned land of defendant.

While, as pointed out, this plat shows two lines on the western boundary, an examination of the field notes shows that only one of these lines was actually

run upon the ground, to wit, that marking the line of ordinary high-water mark. The field notes disclose that the surveyor actually meandered the shores of the bay, monumented the line of survey, and gave the call for every station on the shore line from station 19 to 58, inclusive (Field Notes, pages 4 to 10), with the courses and distances, but show indisputably that the surveyor never actually ran the line which he called "anchorage for ships." The survey was begun at a point at high water mark on the Pacific Ocean, shown by Carrillo, the original Mexican patentee, as the southwest corner of the rancho patented to him by the Mexican Governor of California, and the northwest corner of the rancho of San Augustin Melisse. From this point the surveyor proceeded north along high water mark on the ocean until he reached station No. 19. After reaching that station the field notes say (page 3):

> From this station in order to fix the western boundary of the tract at the anchorage for ships, named in the decree of confirmation, I project a line due west 7.00 chains to the edge of the deep water or channel shown by the map of the U. S. Coast Survey as such anchorage and from thence I project another line along the eastern edge of the deep water or anchorage for ships shown by the map of the U. S. Coast Survey as aforesaid due north 81.00 chains.
>
> And running the traverse line of high water mark around the bay to the Inlet or "Estero" from station No. 19 as follows:

Then follow the courses and distances and various stations from station No. 19 around the shore line of the island to station No. 58, inclusive. After reaching this station the field notes say:

> And from this station I project a line due west 93.00 chains to the edge of the deep water or anchorage for ships as shown by the aforesaid map of the U. S. Coast Survey and by tabling up the traverse of the shore line from Station No. 19 to station No. 58, and the aforesaid projected lines of the western boundary by aid of the map of the U. S. Coast Survey in ascertaining the true anchorage for ships, I find the line from the projected line of 93.00 chains and of the one of 81.00 chains north from the end of the 93.00 chains to be S. W.—chains.
>
> Therefore from station No. 19 the courses and distances of the true boundary are as follows:
>
> End of traverse line; thence west 7.00 to the deep water or anchorage for ships; thence north along the E. edge of the channel or deep water constituting the anchorage for ships as shown by the maps of the U. S. Coast survey 81.00 to curve of line of deep water to the eastward; thence N 48¾ E along same 83.00 to station; thence east 93.00 to station No. 58 of the shore traverse before mentioned from which station the Quartermaster's Storehouse (sometimes used as barracks) at New San Diego bears S 84½ E from this store the meander corner of fourth standard South Range 3 West of San Ber-

nardino Meridian, situated 17.60 chs. west of cor. to secs. 2 and 3; bears N 11½ W distant 100 chains and 36 links.

From these extracts from the field notes it is apparent that the surveyor erroneously assumed that the description of the west boundary set out in the decree, "on the west by the anchorage for ships"—a navigable body of water—required him to project the lines of the survey across the waters of the bay to the deep water channel used by ships entering or leaving San Diego harbor, as shown by some map of the Coast Survey. Projecting these lines was a mere paper survey and not an actual survey on the ground. The plat shows the imaginary stations out at deep water, but none were monumented on the ground by buoys or otherwise, nor are any bearings given, the projected lines being designated as Nos. 19, 20, 21 and 22.

Even if the field notes did not contain the definite statement that these lines were by aid of a coast survey map merely projected, the fact that the edge of the deep water channel is not meandered, and that the soundings shown on plaintiff's exhibit 10 (R. 41) at the line which the surveyor called "anchorage for ships," disclosed such a great depth of water at the assumed stations, preclude any assumption that the courses were actually measured and marked.

The attention of the court is invited to a letter from the Commissioner of the General Land Office, attached to this brief as an appendix, stating that

the lines of the figurative survey failed to close where the projected lines Nos. 21 and 22 are presumed to meet, and that in order to close the alleged survey a line north 28 degrees, 7 minutes east, 7.09 chains, will have to be projected.

Returns by a surveyor general embracing the descriptions of a survey of land are prima facie evidence, and plats and certificates, on account of the official character of the surveyor general, have accorded to them the force and effect of a deposition, *United States* v. *Hanson*, 16 Pet. 200, 201, but "it is not the mere assertion of a surveyor that he had surveyed land that makes it so;" *Winter* v. *United States*, 30 Fed. Cas. 350, 365, and the admission of the survey in evidence does not admit its validity. *United States* v. *Brevard*, 16 Pet. 143, 146.

The legal effect of a survey must be determined not by what the surveyor said but by what he did. In considering the effect of a survey as evidence this court in *Ellicott* v. *Pearl*, 10 Pet. 411, 441, said:

> The survey, made by a surveyor, being under oath, is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat, the lines, corners, trees and other objects on the ground, and to subjoin such remarks as may explain them; but in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties, and subject to

> cross-examination. The reason why a survey, made by a public surveyor in discharge of his public duties, is admitted as evidence, in suits between other parties, is not that it is hearsay; but that the act is officially done under oath, and in discharge of his duties to the government and the public. But it has never been supposed that if, in such a survey, the surveyor should go on to state collateral facts or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons.

In *Winter* v. *United States*, *supra*, the District Court of Arkansas, in determining what was necessary to constitute a survey, said (p. 365):

> It is also quite evident that a survey under the Spanish government meant, as with us, the actual measurement of land, ascertaining the contents by running lines and angles, marking the same, and fixing corners and boundaries.

After quoting as above from *Ellicott* v. *Pearl*, *supra*, the court further said as to that case (p. 365):

> This case is cited because in pointing out the duty of a surveyor of land, it clearly shows the nature of a survey and what must be understood by it; namely, running lines with compass and chain, establishing corners, marking trees and other objects on the ground, giving bearings and distances, and making descriptive field notes and plots of the works. These are the ingredients of an actual survey, as well as the evidences of it;

> for it is not the mere assertion of the surveyor that he had surveyed land that makes it so. U. S. v. Hanson, 16 Pet. [41 U. S.] 200.

In *Muse* v. *Arlington Hotel Co.*, 68 Fed. 637, it was held that the grant papers covering a Spanish grant in Louisiana were ineffectual because, among other reasons, there was no showing of an actual survey on the ground.

A survey not made upon the ground, but merely upon paper, is declared by this court in *United States* v. *Lauton*, 5 How. 10, 27, to be fictitious and not effective to sever from the public domain land claimed under a Spanish grant in Florida. The court said (p. 27):

> In December, 1817, Geo. Clarke, the surveyor-general of the province, filed a plat and certificate of survey in his office, purporting to have been made of this grant, but no proof was offered to show that any such survey had ever been made by Clarke on the ground, and the Superior Court expressed its apprehensions that the survey was fictitious, as appears by the opinion found in the record; yet, as it might turn out otherwise on search being made on the ground, and as the survey might reasonably conform to the calls of the concession, should landmarks be found, a search and resurvey was ordered, and one was made and returned to the court by Gould, corresponding as near as might be, in the judgment of the surveyor, to the lines laid down on Clarke's plat, at the upper end of Dunn's lake. But no linemarks were found

> that had been made by Clarke, and his plat and certificate proved to be merely fictitious, his work not extending beyond what he had done on paper.

And again (p. 27):

> In the first place we are of opinion that the fictitious plat and certificate of Clarke can have no influence in fixing the identity of the land granted.

In *Scull* v. *United States*, 98 U. S. 410, a map was attached to the figurative survey, and the surveyor testified that from the map he could survey land and mark out its metes and bounds, and that he had made an accurate survey of the land claimed. The survey was made by conjecture because it was impossible for the surveyor to make an actual survey at the time. It did not appear that an actual survey had ever been made locating the grant. There was a map prepared subsequently by an engineer (p. 421) which showed the correct location of the grant not made by actual survey, but taking a sectional map of Arkansas and locating the grant on that map. As one of the essentials upon which title under the Spanish grant could be sustained, the court said (p. 419):

> The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise.

And in rejecting the claim it was said (p. 424):

> We are of opinion that for want of any actual survey at the time the grant was made, or at any other time, by the Spanish government, for want of any other separation of the land granted from the mass of the public domain, and for want of any description of the land granted in the instrument of cession or order of survey, by which the land can be surveyed and identified, the claim does not come within the eleventh section of the act of 1869, and that the District Court properly rejected it.

If the plat and field notes of this survey have accorded to them the force and effect of a deposition, *United States* v. *Hanson*, *supra*, we can look to the deposition for the purpose of determining the effect of the surveyor's acts. In his field notes this officer frankly stated that he projected lines out on navigable water by locating the lands on some coast survey map. In other words, he prepared his map or plat of the submerged land, not by actual survey on the ground but by locating land on the coast survey chart. This plat survey of the submerged land, therefore, corresponds exactly with the map prepared by the engineer in the *Sculi* case, *supra* (p. 421), by locating the grant in Arkansas upon a sectional map of that state, which the court denounced as not an actual survey by metes and bounds, and for want of which it rejected the claim to the Spanish grant.

Further than this, as we have before shown, a computation of the elements by which the surveyor

established these conjectural lines discloses that these lines fail to close by a distance of approximately 465 feet. This inaccurate paper survey can not be held to enlarge the terms of the decree and patent so as to embrace lands which are not those specified in the decree and patent as an island or peninsula. The submerged lands and the high lands are naturally and legally separate and distinct, were each separately surveyed by the Surveyor General, and are separately shown on the plat of survey annexed to the record. The decree of confirmation confirmed the title to the island or peninsula as shown on the original map filed with the Espediente, which embraced only the high land. The patent quotes the language of this decree in describing the land according to this map. The descriptive language of the patent referring to the subsequent survey, before quoted herein, is "the tract of land embraced and described in the foregoing survey." As pointed out, this survey described two tracts, one, land in its ordinary sense of visible high land, the other, invisible land, the soil under the sea. To construe the *patent* as describing this invisible soil under the sea is to give undue weight to an act of the surveyor wholly outside his official duty and to one expression in the instrument at the expense of the rest of it, and to convict the patent of glaring inconsistencies and of a clear departure from the terms of the decree of confirmation which it was to effectuate.

The reasonable construction of the patent, in the light of the original map and the decree of confirma-

tion, as well as from the terms of the patent itself, is that the act of the Surveyor General in separately platting on paper the soil under the sea was "not within the scope of his proper official functions," and that the island or peninsula, "the tract of land embraced and described in the foregoing survey," title to which passed by the patent, was the fast land as surveyed and monumented on the ground and as indicated on the plat. This construction makes all parts of the patent consistent, harmonizes the Mexican grant, the decree confirming it, and the well established policy of Mexico and the United States not to grant to individuals the soil under the sea. Further, it gives to the grantee all the land actually surveyed and excludes only the imaginary line projected more than half way across the entrance of the harbor of San Diego, after the survey of the island or peninsula had been accomplished, and upon computations from data afforded by some map from the Coast Survey.

It is respectfully urged, therefore, that the patent properly construed does not embrace these submerged lands. If, however, it can be construed as intending to embrace such lands, it is to this extent void and subject to collateral attack.

The effect of patents issued in confirmation of Mexican grants has been frequently stated by the court. In the earlier decisions it was said when the Government issued the patent confirming these grants it was in the nature of a quitclaim, but recently the court has held that it is more accurate to

say that the action of the United States is a confirmation rather than a quitclaim.

In *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217, 227, Mr. Justice Day, speaking for the court, said:

> This court, speaking by Mr. Justice Miller, tersely disposes of the nature of such old Mexican titles in *Adam* v. *Norris*, 103 U. S. 591, 593:
>
> "But the United States in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a quitclaim—an admission that the rightful ownership had never been in the United States but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases are *Beard* v. *Federy*, 3 Wall. 478; *Henshaw* v. *Bissel*, 18 Wall. 255; *Miller* v. *Dale*, 92 U. S. 473."
>
> It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than quitclaim. *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339, 344.

The court, refusing to review the judgment of the state court on the ground that no federal question was involved, again pointed out that the Act of March 3, 1851, "did not originate federal rights or titles, but merely confirmed the old ones," and said (p. 233):

> And whatever the rule may be as to patents conveying title to the lands of the United States, it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the Act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accrued under a former sovereignty.

In *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344, the court through Mr. Justice Holmes points out that the patent of the United States only confirms the Mexican title but does not release that of the United States, saying:

> But while it is true that in *Beard* v. *Federy*, *sup.*, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power makes it good and valid; so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by force of such words that are foreign to the business of confirmation." Gilbert, Tenures, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be

issued, says that it shall be issued "to the confirmee."

In the light of these authorities, which might be almost indefinitely extended, the right to collaterally assail a patent which embraces lands below ordinary high-water mark depends upon whether the land department had jurisdiction of these tide and submerged lands. Since the land department had neither by survey nor patent the right to enlarge the grant, this, in turn, depends upon whether there was an express grant of these tide lands and submerged lands by the former government. We have demonstrated not only that they were not expressly granted in terms by the Mexican patent, but that that patent in terms protects the servitudes which then existed under the laws of Mexico to use the roads, ports, and banks of the streams for public purposes; and further, that the Governor of California, who issued the patent, had no power to convey the common property of the Mexican people.

Upon the admission of California as a State, therefore, no express grant of lands below ordinary high-water mark having been made by the former government, it can not be asserted that such lands by any possibility became a part of the public domain of the United States, or were in any sense subject to the control of the land department; or that the land department or its surveying agencies had power to determine any question of title thereto. *Iowa* v. *Rood*, 187 U. S. 87, 93.

Questions of fact within the jurisdiction of the Land Department are conclusively settled by rulings preliminary to patent, but the want of authority of that department to issue the patent may be shown by extrinsic evidence. This is settled by many decisions of this court.

In *United States* v. *Stone*, 2 Wall. 525, it was held that land within a military reservation was not subject to patent and that patent therefor was void.

In *Doolan* v. *Carr*, 125 U. S. 618, the previous cases on the subject are carefully reviewed. Carr claimed under a prior valid Mexican grant, confirmed by the land commissioners and by the court, which was surveyed. Doolan claimed under a patent from the United States to the Central Pacific Railroad Company, patent being issued under the Act of Congress to aid in constructing railroads. Carr, in order to show that the patent to the railroad company was issued without authority of law and therefore void, offered evidence of the prior Mexican grant, which evidence was rejected by the trial court. This court, through Mr. Justice Miller, after pointing out that patents issued by the Government were at all times subject to inquiry whether such officers had lawful authority to make a conveyance, said (p. 625):

> But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in

> them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

The cases are reviewed in *Knight* v. *Land Ass'n, supra,* where *Doolan* v. *Carr* is approved.

In *Burfenning* v. *Chicago, St. Paul &c Ry.*, 163 U. S. 321, plaintiff brought an action to recover possession of lands within the territorial limits of the city of Minneapolis, claiming under a patent from the United States land issued to him as an additional homestead granted to soldiers and sailors who served in the war of the rebellion. The patent was attacked on the ground that lands within the limits of any incorporated town already selected as the site of a city or town were excluded by statute from preemption and homestead. Plaintiff contended that the patentability of the lands was a question of fact for the land department to determine, and that its determination in the case was conclusive that the lands

were not at the time the patentee's rights were initiated within the limits of any city. After restating the rule that questions of fact are for the exclusive determination of the land department, the court said (p. 323):

> The case of *Morton* v. *Nebraska*, 21 Wall. 660, is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted as such on the field books, although the notes thereof had not been transferred to the register's general plats. The preemption act of September 4, 1841, c. 16, 5 Stat. 453, 456, declared that "no lands on which are situated any known salines or mines shall be liable to entry." Notwithstanding this prohibition patents were issued for the lands, and it was held that they were absolutely void, the court saying, p. 674: "It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

In *Salt Lake Inv. Co.* v. *Oregon Short Line*, 246 U. S. 446, there were conflicting claims for land in

Utah—one under the preemption law and the other under the statute granting a right of way to a railroad company. It appeared that the railroad was completed and in operation for its entire length before the issuance of patent to the homesteader, but prior to the settlement of the homesteader the lands were within the incorporated limits of Salt Lake City. Mr. Justice Van Devanter, speaking for the court, said (p. 448):

> In the case of *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, a plaintiff in ejectment relied on a patent issued under the homestead law, which adopted the excluding provision of the preemption act, and his title was challenged on the ground that the entry and patent were for land within the corporate limits of Minneapolis. This court observing, first, that the record affirmatively disclosed that the land was in the city limits when the claim was initiated, and second, that the case was not one where a finding by the Land Department on a question of fact resting on parol evidence was sought to be drawn in question, held the patent void under the general rule that "when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law."

> Applying these views, we think MacDuff's settlement and declaratory statement under the preemption act were of no effect. They neither conferred any right on him nor took any from the Government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right of way act as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause.

If the Land Department is without jurisdiction to patent lands in a military reservation, lands covered by a prior valid Mexican grant, or to issue patents under the homestead law to lands within the territorial limits of a city, or to lands which were theretofore classified as saline or otherwise previously segregated from the public domain, it is equally clear that that department is without jurisdiction to patent lands which had theretofore passed under the dominion and sovereignty of a sovereign state.

It is further settled that Congress has never clothed the Land Department with power by approval of surveys to determine questions as to the title of lands under water, or to adjudicate anything whatever on the subject. *Iowa* v. *Rood, supra.*

II.

At most, defendant company's right, title or interest, if any, in the lands below high water mark are subject to the paramount servitudes and powers of the federal and state governments to protect navigation, commerce, and fishery.

The court instructed the jury that defendant company, in the 663 acres of land, termed "tide lands" (R. 103) "has all the rights of full ownership, subject to the reasonable public regulation;" that the present bulkhead line "is a reasonable public regulation," beyond which a solid fill is not permissible without the consent of the government;" that the present pierhead line is a reasonable regulation, "and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers, warehouses, terminals, or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands."

Conceding, *arguendo* only, that the Mexican grant covered lands below ordinary high water mark, the vice of these instructions is that the jury was told that the private ownership and use of such lands were subject only to existing federal regulations as to the harbor lines, and that the lands must be valued by the jury in view of such rights of exclusive owner-

ship and subject, as before said, only to existing regulations of bulkhead and pierhead lines as now fixed by the United States government.

This instruction tells the jury that the private ownership of these submerged lands is full and complete and subject only to existing harbor lines. This is a denial of the power of the federal government to establish and change these harbor lines at pleasure.

It is well settled that this power of the sovereign state or nation is perpetual and is not exhausted by one exercise, and that all privileges granted in public waters are subject to that power, the exercise of which is not a taking of private property for public use but the lawful exercise of a governmental power for the common good. *West Chicago Railroad* v. *Chicago*, 201 U. S. 506; *Greenleaf Lbr. Co.* v. *Garrison*, 237 U. S. 251.

In *Greenleaf Lbr. Co.* v. *Garrison*, the company sought an injunction against the Secretary of War to enjoin interference with complainant's wharf or other property "along or upon the water front of its said property upon the southern branch of the Elizabeth River in the State of Virginia." It was alleged that the wharf was constructed under the authority of the State, and within and upon the harbor line subsequently established by the Secretary of War, and that therefore it was property lawfully owned and could be removed only upon payment of just compensation. The cases are fully reviewed in the opinion of Mr. Justice McKenna, and the court held that while the

states exercise certain control and management of streams within their territory, this control is subject to be superseded by the interference of Congress and is not dependent upon the depth or the shallowness of the water; that the power having been delegated to the Secretary of War to establish harbor lines, this power necessarily required the removal of structures which projected beyond the harbor lines, and that such removal was not a taking of the wharf for public use but was the lawful exercise of governmental power for the common good.

In *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, it was said that the title of the owner of fast lands upon the shore of a navigable river to the bed of the river is at best a qualified one, but while capable of distinctive ownership it passed with the ownership of the shore as the shadow follows the substance. The title, however, was held to be subordinate to the public right of navigation, and that if in the judgment of Congress the use of the bottom of the river was necessary for the purpose of placing structures in aid of navigation, such use was not taking private property for public use, for the owner's title was in its very nature subject to that use, and if structures were placed in navigable waters which were an obstruction or hindrance to navigation, they may be removed and the injurious use of the bed of the stream by the owner forbidden.

So, also, Congress may permit the construction of tunnels, and require the removal of any such structure built with or without its license. Quoting from

Scranton v. *Wheeler*, 179 U. S. 141, 163, the court pointed out that whatever the nature of the interest of a riparian owner of lands in front of his upland bounding on a public navigable water, his title is not as full and complete as his title to fastland but was a qualified title, "a bare technical title, not at his absolute disposal, as is his upland, but to be held *at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.*" [Italics ours.]

In *Los Angeles Milling Co.* v. *Los Angeles*, *supra*, and cases there cited, the extent and character of the rights annexed to the ownership of property acquired in pursuance of the confirmation of grants under the Act of March 3, 1851, were held not to be determined by the judgment of the land commissioners, but were matters of local or general law.

In the case of *People* v. *California Fish Co.*, 166 Calif. 576, 138 Pac. 79, the Supreme Court of California held that the holder of a patent from the state for tide lands does not thereby acquire the entire title and interest in such lands, but they are subject to the easement and servitude of the public for the purposes of navigation and commerce whenever necessary for such public purposes. The court points out that the constitution of the state deprives the legislature of the power to dispose of tide lands fronting upon navigable waters so as to entitle the grantee to destroy or interfere with the public easement for navigation.

Indeed, it has been settled in the United States that the state is without power to abdicate its trust in navigable waters and can make no disposition of them prejudicial to the right of the public to use them for purposes of navigation and commerce, and whether such title remains in the state or has passed into private ownership, the sovereign control both of the state and nation for such public purposes remains the same. In discussing the power of the United States to protect navigation the court, in *People* v. *California Fish Co., supra,* said (p. 600):

> For the present, therefore, and until the federal authority interferes, the state has the same interest in these lands, and the same power over them, as if the harbor lines had not been fixed by federal authority. The defendants have no right to interfere with this power, or to curtail it, on the ground that the United States may do so in the future.

See *Cummings* v. *Chicago,* 188 U. S. 410, 431.

In *United States* v. *Cress,* 243 U. S. 316, 319, it was said (Mr. Justice Pitney speaking for the court):

> The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk,* 94 U. S. 324, 338; *Packer* v. *Bird,* 137 U. S. 661, 671; *Hardin* v. *Jordan,* 140 U. S. 371, 382; *Shively v. Bowlby,* 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *St. Paul*

> *Water Com'rs*, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lattig*, 227 U. S. 229, 243.) * * *.

By the instructions to the jury as to the extent of the private ownership of these submerged lands, they were told that the contemplated magnificent improvements, as shown by the map, Exhibit D of the record, could go on unimpeded by any regulations of either state or nation, and that the private ownership derived from the Mexican government freed these lands from any regulation by California designed to protect the navigable capacity of her harbor entrance, and from any future regulation by the federal government that might be necessary to protect the rights of navigation or the military post across the bay. As to the extent of the claim of defendant company upon which these instructions were based, the following colloquy is illuminative (R. 41, 42):

> The COURT. What do you claim, then, is your right beyond high water mark, out to this survey, the edge of the anchorage—what is your claim?
>
> Mr. DUNNE. Our claim is that we have the right to build wharves and other structures in utilization of our tide lands.

The COURT. Without a franchise?

Mr. DUNNE. Absolutely. We are private owners. * * *

It is unnecessary to argue that the grant from the Mexican government, however far it embraced the lands below ordinary high water mark, did not destroy the sovereignty of the United States over those lands, nor impair its power to protect its public waters for the common good. Nor can it be seriously asserted that the grant from the Mexican government gave a higher character of title to the grantees no matter how far into navigable waters the grant might have extended, than is conferred upon patentees from the state of California of tide lands therein; and from the foregoing discussion we submit that it is obvious that no matter what the character of the title of defendant company may be to the tide or submerged lands, such title is subject, first, to the paramount authority of the federal government to protect its public waters for the common good, and second, to the concurrent, though subordinate, power or authority of the state to regulate and control its public waters in the interest of the common rights of navigation and commerce.

The value of the high land assessed by the jury was based upon the erroneous instruction that defendant company was the "private owner" of the land under the sea and not subject to the paramount rights of the federal and state governments. We insist that "the government can not be justly required to

pay for an element of value which did not inhere in" the high land. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 75, 76.

In this connection the case of *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, is illuminating. In that case the Chamber of Commerce owned a private way which the city sought to condemn for a public street. The Central Wharf and Wet Dock Corporation had an easement of way, light and air over the land, and the Savings Bank held a mortgage on the land subject to the easement. These were the only parties in interest and they filed an agreement that the damages might be assessed in a lump sum. The city refused to assent to such an assessment, insisting that the damages must be assessed according to the condition of the title at the date of the order laying out the street. The Chamber of Commerce, the Dock Corporation, and the Bank insisted that they should recover together the full value of the unrestricted fee to which they asserted they were entitled by virtue of the Fourteenth Amendment to the Constitution. It was agreed that if the value of the unrestricted fee could be recovered damages should be assessed at $60,000, but if the city was right that the damages must be assessed according to the condition of the title at the date of the order laying out the street, the damages should be $5,000. The court, speaking through Mr. Justice Holmes, said (p. 195):

> But the Constitution does not require a disregard of the mode of ownership—of the

state of the title. It does not require a parcel of land to be valued as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement.

III.

In any event, Congress did not authorize by the Act of July 27, 1917, condemnation of the tide lands.

At the trial in the court below (R. 42, 45), it was contended on behalf of the Government that the statute authorizing the taking of the whole of North Island and the determination and appraisal of any rights private parties may have in the island over and beyond the rights of the United States, did not embrace any of the submerged lands, and that Congress did not intend that title should be acquired to any of the land below ordinary high water mark, nor that there should be any condemnation of such land. The court (R. 45) expressed the opinion that if the "government should simply claim in this proceeding the high lands and divest itself of any claim of this subaqueous land, that then the defendant would have a right to file a cross complaint to have that assessed under this law." While there were separate

verdicts valuing the high lands, the marsh lands and the lands below high water mark, the court entered judgment against the Government under the general verdict for $5,000,000, the total value of the land as found.

Ordinarily, it must be conceded that the Government would have the right to condemn such portions of land as it might need for public purposes, but it was asserted by defendant company and held by the court that the Act of Congress authorized the condemnation *of the whole of the island*, which term included the three classes of land.

For the purpose of determining what Congress meant to include by the term "the whole of North Island," it is necessary to examine the history of the legislation leading up to the Act directing the President to take possession thereof.

Congress, by an Act approved March 4, 1915, c. 143, 38 Stat. 1064, authorized the appointment of a commission to investigate and report as to the necessity, desirability and advisability of establishing submarine and aviation bases, among other places, on the Pacific coast. The resolution, which afterwards became the Act, authorizing the taking of possession of North Island by the President, hereinbefore set out, passed the House of Representatives and was sent to the Senate, and accompanying it when it was reported to the Senate, was Senate Report 83 (65th Congress, 1st sess.; Cong. Rec. vol. 55, pt. 5, p. 5100). With this report is submitted a letter from the Secretary of War stating that the

joint board of Army and Navy officers had reported that in their opinion North Island was the best location in the country for the establishment of the joint army and navy station, and recommended that the authority of Congress be obtained for immediately taking possession thereof, and that this report had been approved by the heads of both departments.

The House report was submitted by Mr. Caldwell of the Committee on Millitary Affairs on June 26, 1917, and is found in House Reports, vol. 1, 65th Cong., 1st sess., being report No. 88.

On February 9, 1917, the President transmitted to the Senate and House the third preliminary report of the Commission on Navy Yards and Naval Stations dated January 31, 1917. House Doc., vol. 32, pt. 1, 64th Cong. 2d sess.; Doc. 1946, pt. 3. This report deals exclusively with submarine and aviation bases on the coast of southern California. On page 15 thereof this commission says:

> In examining the San Diego Bay region to discover the most suitable site, it was noted that the commission of army officers, in its report above referred to, had described and commented upon the five sites considered by it as the only ones available.

After discussing the other four sites the report says:

> This leaves available for consideration only site No. 1, North Island, which contains about 1,200 acres of level ground, all well above high water, and fronts both the bay and ocean.

> Adjoining this property on the east is a tract of several hundred acres of shallow submerged land known as Spanish Bight, which could be reclaimed if necessary to form an enlargement of North Island.

The conclusion of this Commission, found on page 26 of the report, was that the best location for this aviation base was in southern California on San Diego Bay. As a part of this report the commission submits as Appendix B (page 28), a report of investigation of different sites for aviation bases at San Diego, California, made by Capt. A. A. Cunningham, United States Marine Corps, who reports on North Island as follows:

> (*a*) This site contains 1,200 acres of high land clear of all obstructions, fairly level and for the most part smooth. It is practically ready for occupancy without improvements in the site itself.

This report also contains as Appendix B, pt. 4, p. 33, data and information furnished the Commission by the San Diego Chamber of Commerce, with a map showing the location and boundary lines of each site. As to site No. 1, North Island, it is said—

> *Topographical features.*—A practically level area, contains 1,200 acres. Fronting on both the bay and the ocean, without obstruction other than buildings used in connection with the aviation school. Shore line, sloping beach with easy access to deep water.
>
> *Statement of ownership and title.*—Owned by Mr. John D. Spreckels. The Coronado Beach

> Co. has title under a patent issued by the United States of America.
>
> * * * * *
>
> *Value*—Assessed by the county at $400 per acre. No selling price obtainable.

Part 7 of Appendix B of this report is a map, a plan of San Diego Bay showing North Island. This map was rejected by the court and was marked as plaintiff's exhibit 10 for identification (R. 41), and is filed with the records in this case. This map shows the meander of the shore line, approximately 1200 acres of fast land.

Mr. Caldwell was the member in charge of the bill upon the floor of the House and submitted the committee report. When the bill was returned from the Senate to the House, Mr. Caldwell, on July 24, 1917 (Cong. Rec. 65th Cong., 1st sess., vol. 55, pt. 6, p. 5434), requested unanimous consent for its consideration. Mr. Mann of Illinois, before yielding unanimous consent, made inquiries of the member in charge of the bill. Mr. Caldwell stated:

> The facts are these: This island has a little over a thousand acres in it; the property has been appraised generally at about a thousand dollars an acre.

Looking at the reports of the committees of the House and Senate as an exposition of the legislative intent (*Binns* v. *United States*, 194 U. S. 486, 495), and the public documents upon a consideration of which the bill was reported to the House, as well as the explanatory statements made by the committee

member in charge of the bill (*Binns* v. *United States, supra; United States* v. *Coca Cola Co.*, 241 U. S. 265, 281; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318; *Duplex Printing Press Co.* v. *Deering*, decided January 3, 1921, not yet reported), it is obvious that Congress, acting upon the information of the Army and Navy Commission, the data furnished by the Chamber of Commerce, and the explanatory remarks of the chairman of the committee, did not contemplate the possession and condemnation of any lands other than the high land, fairly level, and containing about 1200 acres.

IV.

Because the United States was entitled to have the 1232.92 acres of land lying above high water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon, the case should be reversed and remanded.

As above noted, the court instructed the jury that defendant company's ownership extended out beyond ordinary high water mark to the anchorage for ships and included the tide lands, which ownership was derived not from California but from the former Mexican government. And furthermore, that in these tide lands defendant had all the rights of full ownership in their improvement as privately owned tide lands subject only to existing federal regulation of bulkhead and pierhead lines. This erroneous instruction as to title necessarily gave a fictitious value to the high land. It would seem to need no argument

to show that the sole ownership of the company in the tide lands and submerged lands, giving it the exclusive and uncontrolled right to improve and use them in connection with its ownership of the high lands, gave the latter an added value. That the alleged private ownership of the tide lands was a material factor contributing to the value which the jury placed on the uplands is made plain by the evidence admitted by the court, some of it over the exception of the Government. By reference to the record it will be seen that the Government objected to the introduction of evidence as to the uses and adaptability of the tide lands (R. 44), and the court reserved its ruling and it was agreed that the testimony should go in and that the Government had saved the point. R. 45.

The map, Exhibit D, showing the capability and adaptability of the tidelands and highlands for development and the evidence explanatory thereof, was admitted over the objection and exception of the Government. R. 47, 48. Other evidence was admitted, apparently without objection and without exception, expressly directed to prove that the ownership of the tidelands as a unit with the uplands was a material factor in arriving at the value of the uplands.

The jury's appraisal of the upland was predicated (1), upon and controlled by the assumed fact that both tidelands and uplands were united in one ownership, and that this united ownership permitted unhampered development of both free of any restriction, and (2),

upon expert testimony to the effect that the market value of the upland was thereby substantially augmented and enhanced.

In opening its case defendant introduced witness Holmes (R. 44–54) to illustrate by imaginary drawings, called maps (especially Exhibit D), and explanatory testimony, the adaptability of the submerged tidelands for the construction of a great artificial harbor with wharves, basins, embankments and marine terminals, none of which either exist or are proved to be commercially feasible at the present time or in the immediate future.

While examining this witness counsel for the owner said in open court:

> The situation, if your honor please, is peculiar in this case. The tidelands here in point of area, extent, and adaptability are unique, in a class by themselves; perhaps no replica of it anywhere in the State of California. Under those circumstances it can not be said to have a market value in the sense that a 25-foot lot has a market value, and, under those circumstances well-informed persons may be inquired of as to their opinions touching the value of such property. I am now inquiring of this witness his opinion touching the market value of the property, in view of its adaptability for the purposes indicated upon this map, not as to its value when all these improvements have been made and constructed and you have a going concern. Such a value might be fabulous, but its present value, or its value as of the 1st of August, 1917, in view of the fact

> that that intact and unbroken waterfront ownership is presently adaptable to these commercial uses, and was so adaptable in August, 1917.

The witness thereupon stated his opinion that the value of the tidelands (alone) was much more than $3,000,000. While he did not testify at all as to the value of the upland, it is quite obvious that the enormous value attributed by him to the tidelands was because of their connection with the extensive area of adjoining uplands also shown on his maps and because of the statement of counsel (*supra*) as to the intact and unbroken waterfront ownership presently adaptable to the commercial uses pictured on the map and which adaptability is pointed out explicitly by the witness on page 53 of the transcript.

Witness Masten said in part (R. 55):

> It [the property] consisted of an absolute unit, owned by one man, readily converted into blocks and lots for residences, for villa sites, and the water feature of the submerged lands for aquatic sports, swimming pools, yacht harbor, and the like, and it could have been used for hotels and apartment houses. * * * The inner basin, or the basin, the submerged lands, are adaptable for yacht harbors, and the like, and readily lend themselves to the use of boats for people who can afford them. * * *

On page 56 he again referred to the adaptability of tidelands to residential features, such as yacht basins, swimming parks, aquatic parks, etc., and on page 57

spoke of the commercial adaptability of that part of the island adjacent to the submerged lands. He then said:

> The circumstance that a large tract of land like North Island regarded from the point of view of any use, residential or commercial, for which it is adaptable, is in a unitary, single ownership—that it has wholeness of ownership for the purposes of purchase and sale—is, in my judgment, a factor or element of value in respect to the property.

Witness Burnham said (R. 65) that he considered the factor of a unitary and intact ownership an element in the residential adaptability and suitability of that property, and that the ownership of the tide lands was adaptable "as entering into the residential availability of the tract," inasmuch as it insures the residents access to the water and that no industries could be put in front of them; that a beautiful aquatic park could be developed and maintained there, and that a Venetian village could be worked out splendidly, making homes on small islands which could easily be thrown up, and club house, hotel or villa sites would be a possibility. That the tide lands were capable also of commercial use but not in connection with the residential proposition, and that the uplands and tide lands could be developed either as a residential proposition or for commercial purposes, but that one purpose militated against the other.

Witness Barney said (R. 71) that the tide lands would be quite a feature in connection with the

residential section, provided they were given over for the use of the residents of North Island, and were adaptable for use as a pleasure ground, saying "in my judgment as of August 1, 1917, the singleness and intactness of ownership of this entire tract did enter into its value as a whole, because it could be developed along any line for residence purposes * * *."

Witness Spreckels, the actual owner of the property, said (R. 75, 76): "The unity and intactness of ownership, in my judgment, of North Island as a whole, most decidedly enters as a factor in the value of the property." He placed its market value as a whole as between seven and eight million dollars. On cross-examination he emphasized the advantages of his ownership making possible the development of industries upon submerged lands, and calling attention to the lack of such accommodation elsewhere in San Diego harbor. R. 76, 78.

Witness Welles (R. 80) said: "I regard the tide lands as a very great addition to the use of the land. It gives one a water garden, so to speak, in his back yard." This witness estimated $7,300,000 as the market value of the whole property. He further said: "You have freedom of development in this private ownership for water front purposes that you do not possess on the city water front. You have back land there a mile and a half deep that you can run in all sorts of industries, and the average industry on the water front takes in from 15 to 18 hundred feet in depth, as shown on the Pacific coast." R. 84.

Witness Mooser (R. 84, 86) testified to the general adaptability of the land for residential, commercial, industrial and railroad terminal purposes. That it was adaptable commercially principally because of its water front facilities, saying "I know of but very few other pieces of property located on the water front in the State of California where the individual title goes out to the pierhead line. It is easily adaptable to the purpose of a railroad terminal, and its main industrial value comes from the fact that water and rail are brought together. In my judgment, the fair market value of that property, as of the 1st of August, 1917, in view of all the adaptabilities to which it could be put, was $7,000,000. * * * If the entire island were used exclusively residentially, and the water front made use of for an aquatic park, bathing establishments, and establishments of that character, in order to enhance the value of the residential land, I would put the value of the residential land as high as $5,000 an acre."

Under this glowing testimony as to the possibilities of the development of the high lands based upon the exclusive ownership of the tide lands and the development of the tide lands, backed up by unity of ownership with the high lands, and the expressed opinion of experts that this unity of ownership was a very material factor in the valuation of the high land, it is beyond controversy that the high land was given a fictitious value.

It is confidently submitted that the government was entitled to have this high land valued by the

jury under its requested instruction that the State of California is the owner of all land bordering upon the tide waters within the state, and that the private ownership of land bordering thereon could only extend to the ordinary high water mark. *Boston Chamber of Commerce* v. *Boston, supra.*

There is an added assignment of error to the action of the court in admitting in evidence the map—Exhibit D—for the reason that the map did not merely show the uses to which the land could be adapted, but was extended to include all possible future uses under circumstances which did not exist and which in the future may never exist and for the further reason that the map included submerged and other lands adjacent to North Island and forming no part thereof, upon which were to be constructed wharves, warehouses, docks, piers and basins.

There is no specific assignment of error to the admission of the evidence of the witness Holmes and other witnesses, explanatory of this map, but the whole evidence is copied in one bill of exceptions, and it appears (R. 44) that objection was made to this evidence and (R. 45) that the court reserved its ruling and admitted the testimony upon the following understanding:

> The COURT. * * * I will reserve my ruling on the objection made.
>
> Mr. DENIS. That is agreeable to the Government, and this testimony that is about to be offered will not be interrupted by constant objections from the Government.

> The COURT. No need. I think you have saved your point now, and there is no need of any further objection

We think the assignment of error is well taken and that the map and opinion of witness Holmes of the high value of this property are not evidence tending to show the compensation to which the owner is entitled, "by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 77. In *Chicago, Burlington &c R. Co.* v. *Chicago*, 166 U. S. 226, 250, the court again states the general rule as laid down in *Boom Co.* v. *Patterson* that compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, and then adds: "It is well settled that 'mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded,'" citing cases.

The opinions of this witness and of the other witnesses in the case, of the high value of these lands, were avowedly and obviously formed by mere visions and predicted possibilities of potential improvements which involved the expenditure of large capital and the inevitable passing of many years before consummation, and the map introduced in evidence would do credit as a part of the prospectus of an enthusiastic vendor of lots in a wild-cat-oil-boom town.

There is no evidence in the case of existing wants of the city of San Diego or the community surrounding it, or such as might be reasonably expected in the near future, and the map and testimony explanatory thereof show a purely speculative value of the property and are no evidence of its present value. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is of course difficult to lay down any hard and fast rule, but it is respectfully submitted that the Government of the United States should not be required in condemning property for public uses to submit the value of such property to a jury upon evidence having no regard to the existing reasonably expected wants of the community, but founded only upon the flamboyant optimism of local real estate experts as to the possibilities of the development of the property at some distant time, and who did not hesitate to include in the valuation of this land the God-given climate of California.

CONCLUSION.

For the errors apparent on the record the judgment of the District Court should be reversed and the case remanded for further trial.

Respectfully submitted.

LESLIE C. GARNETT,
Assistant Attorney General.
CHARLES S. LAWRENCE,
Attorney.

FEBRUARY, 1921.

APPENDIX.

Decree of the 18th August, 1824, Respecting Colonization.

The sovereign general constituent Congress of the United Mexican States has been pleased to decree—

1st. The Mexican nation promises to those foreigners who may come to establish themselves in its territory security in their persons and property, provided they subject themselves to the laws of the country.

2d. The objects of this law are those national lands which are neither private property nor belong to any corporation or pueblo, and can therefore be colonized.

3d. To this end the Congress of the States will form, as soon as possible, the laws and regulations of colonization of their respective demarcation, with entire conformity to the constitutive act, the general constitution, and the rules established in this law.

4th. Those territories comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the seacoast, can not be colonized without the previous approval of the supreme general executive power.

5th. If, for the defence or security of the nation, the federal government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general Congress, or during its recess with that of the government council.

6th. Before the expiration of four years after the publication of this law, no tax or duty (direcho) shall be imposed on the entry of the persons of foreigners who come to establish themselves for the first time in the nation.

7th. Previous to the year 1840 the general Congress can not prohibit the entry of foreigners to colonize, except compelled to do so with respect to the individuals of some nation by powerful reasons.

8th. The government, without prejudicing the object of this law, will take the precautionary measures which it may consider necessary for the security of the federation, with respect to the foreigners who may come to colonize. In the distribution of lands, Mexican citizens are to be attended to in preference; and no distinction shall be made amongst these, except such only as is due to private merit and services rendered the country, or inequality of circumstances, residence in the place to which the lands distributed belong.

10th. Military persons who are entitled to lands by the promise made on the 27th of March, 1821, shall be attended to in the States, on producing the diplomas granted to them to that effect by the supreme executive power.

11th. If by the decrees of capitulation, according to the probabilities of life, the supreme executive should see fit to alienate any portion of land in favor of any military or civil officers of the federation, it may so dispose of the vacant lands of the territories.

12th. No one person shall be allowed to obtain the ownership of more than one league square, of five

thousand varas (5,000 v.), of irrigable land (de regadio), four superficial ones of land dependent on the seasons (de temporal), and six superficial ones for the purpose of rearing cattle (de abreradiso).

13th. The new colonists can not transfer their possessions in mortmain (manos muertas).

14th. This law guarantees the contracts which the grantees (empressarios) may make with the families which they may bring out at their expense; provided they are not contrary to the laws.

15th. No one who, by virtue of this law, shall acquire the ownership of lands, shall retain them if he shall reside out of the territory of the republic.

16th. The Government in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic.

General Rules and Regulations for the Colonization of Territories of the Republic.—Mexico, November 21, 1828.

It being stipulated in the 15th article of the general law of colonization of the 18th of August, 1824, that the government, in conformity with the principles established in said law, shall proceed to the colonization of the territories of the republic; and it being very desirable, in order to give to said article the most punctual and exact fulfillment, to dictate some general rules for facilitating its execution in such cases as may occur, his excellency has seen fit to determine on the following articles:

1st. The governors (gefes politicos) of the territories are authorized (in compliance with the law of the general Congress of the 18th of August, 1824, and under the conditions hereafter specified) to grant

vacant lands in their respective territories to such contractors (empresarios), families, or private persons, whether Mexicans or foreigners, who may ask for them, for the purpose of cultivating and inhabiting them.

2d. Every person soliciting lands, whether he be an empresario, head of a family, or private person, shall address to the governor of the respective territory a petition, expressing his name, country, profession, the number, description, religion, and other circumstances of the families or persons with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the land asked for.

3d. The governor shall proceed immediately to obtain the necessary information whether the petition embraces the requisite conditions required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to; or if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant or not.

4th. This being done, the governor shall accede or not to such petition, in exact conformity to the laws on the subject, and especially to the beforementioned one of the 18th of August, 1824.

5th. The grants made to families or private persons shall not be held to be definitely valid without the previous consent of the territorial deputation, to which end the respective documents (espedientes) shall be forwarded to it.

6th. When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision.

7th. The grants made to empresarios for them to colonize with many families shall not be held to be definitely valid until the approval of the supreme government be obtained; to which the necessary documents must be forwarded, along with the report of the territorial deputation.

8th. The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given.

9th. The necessary record shall be kept in a book destined for the purpose, of all the petitions presented, and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded quarterly to the supreme government.

10th. No capitulization shall be admitted for a new town except the capitulizator bind himself to present, as colonists, twelve families at least.

11th. The governor shall designate to the new colonists a proportionate time within which he shall be bound to cultivate or occupy the land on the terms and with the number of persons or families which he may have capitulized for, it being understood that if he does not comply, the grant of the land shall remain void; nevertheless, the governor may revalidate it in proportion to the part which the party may have fulfilled.

12th. Every new colonist, after having cultivated or occupied the land agreeable to his capitulization, will take care to prove the same before the municipal authority, in order that, the necessary record being made, he may consolidate and secure his right of ownership, so that he may dispose freely thereof.

13th. The reunion of many families into one town shall follow, in its formation, interior government, and policy, the rules established by the existing laws for the other towns of the republic, special care being taken that the new ones are built with all possible regularity.

14th. The minimum of irrigable land to be given to one person for colonization shall be 200 varas square; the minimum of land called de temporal shall be 800 varas square, and the minimum for breeding cattle (de obsevadeso) shall be 1,200 varas square.

15th. The land given for a house-lot shall be 100 varas.

16th. The spaces which may remain between the colonized lands may be distributed among the adjoining proprietors who shall have cultivated theirs with the most application and have not received the whole extent of land allowed by the law, or to the children of said proprietors, who may ask for them to combine the possessions of their families; but on this subject particular attention must be paid to the morality and industries of the parties.

17th. In those territories where there are missions the land occupied by them can not be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists.

Extracts from page 3 to top of page 10, inclusive, of the field notes of the official survey of the peninsula or island of San Diego, commenced June 29, 1867, and completed July —, 1867:

Thence N. 37 W. 11.00 to station No. 19 and from this station in order to fix the western boundary of the tract at the anchorage for ships, named in the

decree of confirmation, I project a line due west 7.00 chains to the edge of the deep water or channel shown by the map of the U. S. Coast Survey as such anchorage and from thence I project another line along the eastern edge of the deep water or anchorage for ships shown by the map of the U. S. Coast Survey as aforesaid due north 81.00 chains.

And running the traverse line of high water mark around the bay to the inlet or "estero" from station No. 19, as follows:

(Traverse for obtaining west boundary.)

N. 14½ W. 13.00, to Station No. 20; thence N. 3¼ W. 8.00, to Station No. 21, from which the point of ballast point before taken bears S. 21¾ W.; thence N. 75 E. 50, to Station No. 22; thence S. 22 E. 9.00, to Station No. 23; thence S. 82 E., 4.00, to Station No. 24; thence N. 84½ E. 2.00, to Station No. 25, and deposit a tin oil can 12 x 6 in. on edge of salt marsh; thence S. 77 E. 5.00, to Station No. 26; thence N. 72 E. 3.60, to Station No. 27; thence S. 8 E. 5.00, to Station No. 28; thence S. 26¾ E. 5.00, to Station No. 29, salt grass 1 chain wide; thence S. 62 E. 5.10, to Station No. 30, an old pile of rocks; thence S. 79 E. 3.00, to a trail over which are rolled barrels of water from a hhd. set in a spring of fresh water, dist. some 5 chns. S. 10 E. 3.50, to a point from which along the shore the salt marsh is about 60 lks. wide; 8.00, to Station No. 31, salt marsh; thence S. 69 E. 2.00, to Station No. 32; thence N. 88 E. 7.50, to Station No. 33; thence N. 82 E. 7.50, to station No. 34; thence N. 72 E. 7.00, to station No. 35; thence N. 63 E. 7.00, to Station No. 36 or point of inlet; thence S. 88½ W. 25.00, to Station No. 37; thence N. 86½ W. 5.00, to Station No. 38; thence S. 61¾ W. 1.00, to Station No. 39; thence N. 48 W. 2.00, to station No.

40; thence N. 6½ W. 3.00, to Station No. 41; thence N. 9¼ E. 1.00, across slough 12 lks. wide from NE. 13.00, to Station No. 42, in salt marsh 150 lks. from water; thence N. 72 W. 10.00, to Station No. 43, in salt marsh some 150 lks. from water; thence S. 63 W. 8.00, to Station No. 44, in marsh some 2 chns. to water; thence N. 43¾ W. 2.00, to Station No. 45, from which a buoy in the harbor bears S. 89½ W. and another buoy bears N. 54¼ W. marked Z; thence along the beach at high-water mark, N. 15½ E. 10.00, to Station No. 46, from which the tide gauge at the Plaza bears N. 42¾ W.; thence N. 22 E. 7.00, to Station No. 47, from which one of the buoys before taken bears S. 71½ W. and the other buoy 89¾ W.; thence N. 29¾ E. 8.00, to commencement of bluff of high land some 6 feet high and along the base of same at high-water mark 17.00, to Station No. 48; thence N. 34½ E. 8.00, to Station No. 49, a 24-lb. cannon ball; thence N. 38½ E. 20.00, to Station No. 50, from which the tide gauge before taken bears N. 81¾ W.; thence N. 49¼ E. 10.00, to Station No. 51; thence N. 54½ E. 17.00, to Station No. 52; thence N. 63 E. 13.00, to Station No. 53; thence N. 63½ E. 30.00, to Station No. 54; thence N. 61 E. 10.00, to Station No. 55; thence N. 52 E. 28.00, to Station No. 56; thence N. 68 E. 7.00, to Station No. 57; thence N. 84 E. 10.00, to Station No. 58, and from this station I project a line due west 93.00 chains to the edge of the deep water or anchorage for ships as shown by the aforesaid map of the U. S. Coast Survey and by tabling up the traverse of the shore line from Station No. 19 to Station No. 58, and the aforesaid projected lines of the western boundary by aid of the map of the U. S. Coast Survey in ascertaining the true anchorage for ships, I find the line from the projected

line of 93.00 chains and of the one of 81.00 chains north from the end of the 93.00 chains to be S. W. — chains.

Therefore from Station No. 19 the courses and distances of the true boundary are as follows:

End of traverse line; thence west 7.00, to the deep water or anchorage for ships; thence north, along the E. edge of the channel or deep water constituting the anchorage for ships as shown by the maps of the U. S. Coast Survey, 81.00, to curve of line of deep water to the eastward; thence N. 48¾ E., along same, 83.00, to station; thence east 93.00, to Station No. 58 of the shore traverse before mentioned, from which station the quartermaster's storehouse (sometimes used as barracks) at New San Diego bears S. 84½ E. from this store the meander corner of fourth standard—south range 3 west of San Bernardino Meridian, situated 17.60 chs. west of cor. to secs. 2 and 3; bears N. 11½ W. distant 100 chains and 36 links.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, February 19, 1921.

DEAR MR. ATTORNEY GENERAL: In compliance with your informal request for a statement with reference to certain features appearing of record in the survey of the Peninsula or Island of San Diego, California, the following is submitted as the result of a consideration of that part of the record relating to the location by the surveyor of the anchorage ground referred to as adjacent to the upland included in said claim:

From a study of the field notes of the survey of the Peninsula or Island of San Diego, executed by Henry

Hancock, Deputy Surveyor, under his instructions of May 20, 1867, together with a computation of the results of the traverse line between Stations 19 and 58, it is concluded that the deputy had before him a Coast Survey Chart, on which were delineated certain indications of the location of an anchorage for ships, the limits of which he wished to determine and record in his field notes. For this purpose, he evidently laid down certain courses and distances on the chart, such as that from the corresponding point of his Station 19, whence he projected on paper a line due west 7.00 chs.: thence another line due north 81.00 chs.: here he stopped projecting, and traversed on shore a series of lines from Station 19 to Station 58; from this last station on shore, he, apparently, reverted to the corresponding point on his chart and projected thereon a line due west 93 chs., and from his traverse on shore found the elements necessary for the computation of the line connecting the west end of the 93 chs. projected line to the north end of his 81 chs. projected line; a computation of these elements indicates that this line should be S. 50° 37′ W., 76.41 chs. In the compilation of the courses and distances on page 9 of the deputy's field notes, this line is given coming up from the south as N. $48\frac{3}{4}$° E. 83.00 chs., when according to the above conclusions it should have been given as N. 50° 37′ E., 76.41 chs.

The consequence is that there is a failure to close represented by a line N. 28° 07′ E., 7.09 chs.

Very respectfully,

CLAY TALLMAN,
Commissioner.

The honorable the ATTORNEY GENERAL,
Department of Justice.

Translation

Nº188.
Frederick Billings et al. Assignee.
Isla de San Diego (Island of San Diego)
Espediente (Plaintiff or Petitioner)
Filed in office Sept. 22d, 1852.
Geo. Fisher.
sy.

Diseno de la Ysla o Peninsula
(Map of the Island or Peninsula)
que pretende al ciudadano Pedro C. Carrillo
(which belongs to citizen Pedro C. Carrillo).

Inscriptions on map

Rumbo Norte – North course (compass bearing)
Pt. de Estero – Inlet Point.
Pt. de los Muertos – Dead Men's Point.
San Diego – San Diego.
Escala de Millas – Scale of Miles.

OVERSIZE PAGE
SEE NEXT FRAME

Diseño de la Isla ó Peninsula
que pretende el Ciudadano Pedro C. Carrillo

N.º 188

Francis Burroughs el Ac. Agujar
Isla de San Diego

Expediente

Filed in Office Sept 22d 1852
Chas. Ricker

INDEX.

	Page.
Propositions	2
I. The limits of the jurisdiction of the California Land Commission	3
II. The effect of the decree of confirmation as a limitation of the powers of the Land Department	15
III. The quality and incidents of title to submerged lands under the law of California	26

STATUTES.

Act of March 3, 1851, 9 Stat. 631	2, 4, 5, 6, 10
Act of August 31, 1852, 10 Stat. 76	8
Act of March 3, 1853, 10 Stat. 245	8
Act of June 14, 1860, 12 Stat. 33	8, 15
Act of July 1, 1864, 13 Stat. 332	8
Act of March 8, 1866, 14 Stat. 4	9
Act of July 23, 1866, 14 Stat. 220	8
Act of March 3, 1891, 26 Stat. 1099	25
Act of July 27, 1917, 40 Stat. 247	2
Hall's Mexican Laws, p. 147	5

CITATIONS.

Butiller v. *Dominguez*, 130 U. S. 238	9
Cragin v. *Powell*, 128 U. S. 691	16
Cummings v. *Chicago*, 188 U. S. 410	32
Dominguez v. *Benning*, 167 U. S. 723	7, 8, 15
Grunlaf Johnson Lbr. Co. v. *Garrison*, 237 U. S. 251	32
Grisar v. *McDowell*, 6 Wall. 363	4, 10, 13
Goodtitle v. *Kibbe*, 9 How. 470	3, 5
Hornsby v. *United States*, 10 Wall. 224	15
Illinois Cent. R. Co. v. *Illinois*, 146 U. S. 387	32
Iowa v. *Rood*, 187 U. S. 87	16
Knight v. *Land Ass'n*, 142 U. S. 161	3, 9, 19, 21, 23
La Roque v. *United States*, 239 U. S. 62	25
Los Angeles Milling Co. v. *Los Angeles*, 217 U. S. 217	33
Newhall v. *Sanger*, 92 U. S. 761	6
Packer v. *Bird*, 137 U. S. 661	19, 20
People v. *California Fish Co.*, 166 Calif. 576	33
Salt Lake Inv. Co. v. *Oregon Short Line*, 246 U. S. 446	25
San Francisco v. *Le Roy*, 138 U. S. 656	3
Shively v. *Bowlby*, 152 U. S. 1	3, 18
Tuckemacker v. *Thompson*, 18 Calif. 11	14
The Pueblo case, 4 Sawyer, 553	10, 11
Tripp v. *Spring*, 5 Sawyer, 209	13, 19
United Land Ass'n v. *Knight*, 85 Calif. 445	22
United States v. *Hancock*, 133 U. S. 193	15, 19
United States v. *Santa Fe*, 165 U. S. 675	10, 13
Valentine v. *Sloss*, 103 Calif. 215	14
Ward v. *Mulford*, 32 Calif. 365	14

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA *Plaintiff in error,* *v.* THE CORONADO BEACH COMPANY.	No. 524.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

PETITION FOR REHEARING.

Come now the United States, plaintiffs in error in the above entitled cause, and respectfully present their petition for a rehearing.

As the result of the ruling of the trial court that defendant in error, as the private owner of 663 acres of lands under navigable water, was vested with practically complete rights to utilize them for private purposes free of governmental control, the appraisal of fast lands expropriated by the government was enormously augmented. This court has

decided that Congress directed by the Act of July 27, 1917, c. 42, 40 Stat. 247, that these submerged lands be expropriated and appraised. The ruling as to title affirmed by this court raises questions of some economic and public importance. The points of law involved are, it is believed, novel. Moreover, the judgment compels payment to defendant in error of a large sum as compensation for the expropriation of submerged lands, to which, as the Government still respectfully contends, the State of California has clear title. If they have been expropriated their appraised value justly belongs to the State and not to the Coronado Beach Company.

The Government therefore respectfully urges consideration of the following propositions:

I.

The Act of March 3, 1851, c. 41, 9 Stat. 631, did not confer upon either the judicial or the administrative agency set up, jurisdiction to adjudicate or to deal with private Mexican claims to lands under navigable waters.

II.

At most the asserted extinguishment or destruction of California's title, otherwise vested in her by her admission in 1850, must result from a decree of confirmation. Since there was no such decree, the State's title could not be extinguished or destroyed by an ultra vires survey and patent.

III.

Conceding for argument that titular ownership passed by the confirmation and patent, the right to utilize the lands for private purposes is subject both to State and Federal control to an extent which the instructions to the jury and its appraisal based thereon wholly failed to recognize.

I.

The limits of the jurisdiction of the California Land Commission.

The Government does not insist that the Congress itself through appropriate legislation (passed before or after the admission of California) was constitutionally incapable of recognizing as valid under treaty obligations and of confirming Mexican grants covering lands under navigable water, even though the consequence of such recognition or confirmation might be to affect the otherwise unassailable title of California thereto. This point is perhaps settled beyond cavil, and *congressional power* to this extent is recognized by *Knight* v. *Land Ass'n*, 142 U. S. 161; *San Francisco* v. *Le Roy*, 138 U. S. 656; *Shively* v. *Bowlby*, 152 U. S. 13, 47, although, theretofore, in *Goodtitle* v. *Kibbe*, 9 How. 470, this court had denied the power of Congress after the admission of Alabama to satisfy at her expense imperfect or inchoate claims (which is the character of the one here involved) covering such submerged lands.

Unquestionably, however, power to recognize and to confirm such claims is in *Congress* and not in the courts. *Grisar* v. *McDowell*, 6 Wall. 363, 379. Moreover, Congress may exercise its power by direct legislation or it may delegate authority to a commission such as that created by the Act of March 3, 1851, c. 41, 9 Stat. 631. And it would seem axiomatic that the Congress may delegate to a commission either the whole or only a portion of its proper powers in this regard.

The point here made by the Government is that in this instance and by the terms of this statute Congress in fact delegated to the agencies set up thereby only a portion of its plenary power to satisfy Mexican claims and that by a true construction of the text and meaning of this law the jurisdiction and powers of the commission were confined to hearing and determining claims to "public lands" and hence it was without delegated power to deal, on behalf of a private claimant, in any manner with title to soil underlying navigable waters within the State of California.

The point which the Government desires again to urge is therefore purely a question of statutory construction and of the true meaning of the language employed in the Act of March 3, 1851, *supra*.

As an aid in determining the meaning of this statute, it is proper to consider the state of existing law and policy at the time of its enactment. At that time, unquestionably, it was firmly established that, under neither the common law nor the civil law, was it customary or indeed permissible (barring isolated an

exceptional cases) for the sovereign to grant to *private claimants* lands below the limit of high water mark. Moreover, under existing Mexican law and under the Colonization law of August 18, 1824 (Hall's Mex. Laws, p. 147), the territorial governors of California were wholly without power to grant lands below high tide, and this, it may be assumed, was within the knowledge of Congress. It may be also proper to note, merely as a further aid in textual construction, that at the time (1851) of the passage of this statute the principle laid down in *Goodtitle* v. *Kibbe*, *supra*, was perhaps regarded as sound law, and hence to assume that Congress would not, without deep consideration and careful choice of language, undertake to set up subordinate tribunals vested with plenary power to confirm inchoate Mexican grants affecting the submerged lands of California, already admitted to the Union on equal terms with her sisters and like them presumably entitled to full control and ownership of public waters.

With the foregoing considerations to guide, we come to construe the text of the Act of March 3, 1851, *supra*, and to inquire what was the extent of the jurisdiction conferred thereby on the Land Commission and on the Land Department.*

The Government contends that the text, reasonably construed, confers on these bodies jurisdiction only over "public lands" or "public domain" and that these phrases have meanings strictly limited and accurately defined and, when used in a federal stat-

*The full text of the act is printed in an appendix.

ute, exclude any lands except such as are open to disposition, settlement and entry under the applicable laws of the United States. That is the definition given by this court in a case decided on this statute, *Newhall* v. *Sanger*, 92 U. S. 761.

Considering what has been said, is it not reasonable to argue that, even if the Congress of 1851 had in mind the possibility that the public harbors of California had, in fact, been parcelled out to private individuals by Governor Pio Pico and his predecessors, it would have reserved to itself the disposal of such claims and the determination of the Government's treaty obligations in such unprecedented cases? It is not fair to assume, *a priori*, that there would naturally be no delegation of such responsible authority to a mere commission and that powers, crippling, as they well might, the exercise of full sovereignty by a State of the Union, would not be put in commission without clear language. In reading the text the assumption is borne out. There is no language there remotely hinting at such powers, and we find in section 13 of the statute a clear and unmistakable guide to the construction here urged. It is there provided:

> That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the

> date of this act, shall be deemed, held, and considered as a part of the *public domain of the United States.*

The pertinence of the argument drawn from this section can be illustrated, if need be, by the facts detailed and the claim made in the case of *Dominguez* v. *Banning*, 167 U. S. 723. Appellants there based their claim to the island in controversy on the argument that the entire area constituting the navigable inner Bay of San Pedro had been confirmed to them by the decree of the Land Court constituted by the Act under discussion, and that this area was also legally and actually within the original calls and boundaries of their Mexican grant. On considerations not particularly relevant to the topic presently discussed the litigation resulted in a denial of this claim. In substance it was adjudged that the claim had been rejected by the agencies set up by the Act of 1851.

Considering the text of section 13 of the Act of 1851, what legal result followed final rejection of the claim of Dominguez? Were the lands composing the rejected claim as provided in section 13 thereafter to be "deemed, held and considered as a part of the public domain of the United States?" Obviously not, unless the rejection of a claim or failure to present it within two years would have the amazing effect of translating or transforming a part of the public property of California into a portion of the "public domain" of the United States. So in the instant case, assuming for argument that claimants

did, in fact, present, for confirmation, to the Land Commission a Mexican grant actually covering the 663 acres of lands under water here in question, and assuming further that the claim had been there definitely rejected, such rejection would not have the consequence called for by section 13, *supra*, since submerged lands could not possibly revert to the "public domain" of the United States. Does it not follow that section 13 is incapable of intelligible construction and that it cannot be read consistently with any hypothesis except the one here urged, namely, that the purpose of the statute was to confine the jurisdiction and powers of this commission to the "public domain" in the narrow sense to which that term has been restricted by repeated decisions of this court? It is for this reason perhaps that Mr. Justice Harlan in *Dominguez* v. *Banning*, page 744, was careful to say that the opinion was confined to the fast land in controversy and decided nothing in respect of the title of California to the submerged lands of the bay.

It is to be noted also that considering all the legislation of Congress * on the subject of California land claims, it clearly appears that the one controlling purpose of Congress in its enactment was *speedily* to free the "public lands" of the United States from the incubus of invalid Mexican claims thereto so as to permit them to be homesteaded and settled on by American citizens in consonance

* Act March 3, 1851, c. 41, 9 Stat. 631, §13; August 31, 1852, c. 108, 10 Stat. 76, 91; March 3, 1853, c. 145, 10 Stat. 245, §3; June 14, 1860, c. 128, 12 Stat. 33; July 1, 1864, c. 194, 13 Stat. 332; July 23, 1866, c. 214, 14 Stat. 220, §8.

with the immemorial policy thus to build up the civilization of our acquired territories.

The purpose and scope of the Act are well described in *Botiller* v. *Dominguez*, 130 U. S. 238, 249, where it is said, in substance, that the aim of the statute was attained whenever the lands which the United States owned as property which could be sold to others, either absolutely or by permitting them to settle thereon with preemption rights, or which could be reserved from public sale entirely, were separated from those lands which belonged, either equitably or legally, to private parties under a claim of right derived from the Spanish or Mexican governments.

The view here urged does not conflict with any construction heretofore put upon this statute in any case whose facts resemble those presented here. In *Knight* v. *Land Ass'n*, 142 U. S. 161, it was held that lands lying below high water mark of Mission Creek, a navigable arm of the Bay of San Francisco, were part of and, in fulfillment of treaty obligations, must pass to the Pueblo of San Francisco because included within the Pueblo as established by the Mexican government. But the distinction between that case and this is clear. There the question here made as to the jurisdiction of the Land Commission was not open, because the claim of the Pueblo had been confirmed not alone by the tribunal set up by the Act of 1851 but by congressional act. Act of March 8, 1866, c. 13, 14 Stat. 4. Whatever, therefore, may have been the true limits of the

jurisdiction of Land Commission or of Land Department, these could not be and were not an issue in the *Knight* case, because there California's claim to the disputed land had been effectively silenced in favor of the Pueblo by special legislation of Congress, and as to the power and jurisdiction of Congress thus to satisfy treaty obligations at the expense of the State's public domain before or after its admission, there can now, perhaps, be no question.

United States v. *Santa Fe*, 165 U. S. 675, 716.
Grisar v. *McDowell*, 6 Wall. 363, 378.
The Pueblo case, 4 Sawyer, 553, 583.

The powers of the Land Commission in respect of the claims of pueblos are defined in the Act of March 3, 1851, in a separate section (14) wherein is declared and recognized a presumption in favor of a grant from the mere existence of the pueblo. Practically, therefore, the duties of the commission were to define the limits of the grant. The Mexican pueblo, like its successor the City of San Francisco, was but an arm of government. Hence the decree and the Congressional act explicitly confirming it did not have the effect of divesting California of her sovereign control of public property or public waters within the definitively declared limits of the municipality. Since the city was a mere arm of California state government, and since enjoyment of that portion of the four square leagues which actually passed under municipal control was subject to the legislative power of the State, there was no reason why Congress (as it in fact did) should not have con-

firmed the claim. The pueblo title to the navigable inlets and streams within her four square leagues was of a quality wholly different from that which might be asserted and which is here asserted by a *private claimant*. The pueblo and its successor in title, the City of San Francisco, acting always under the guidance of the State, owned and controlled these highways and public places and disposed of them by reclamation or otherwise under trusts for the *benefit of the people of the state*. They were in no sense private property.

As said in the *Pueblo* case, 4 Sawy. 566:

> It is difficult to determine with precision the exact character of the right or title held by pueblos to the lands assigned to them. The government undoubtedly retained a right to control their use and disposition; and to appropriate them to public uses until they had been vested in private proprietorship. Numerous laws have been cited to show that the title remained absolutely in the government. The same laws were cited to the Supreme Court of this State when the subject was before that tribunal, and in relation to them the court said: "We see nothing in these laws opposed to the views we have already expressed, that the towns had such a right, title and interest in these lands as to enable them to use and dispose of them in the manner authorized by law or by special orders, and consonant with the object of the endowment and trust. Undoubtedly the right of control remained in the sovereign, who might authorize or forbid any

municipal or other officer to grant or dispose of such lands, even for the purposes of the endowment or trust. Such general right, with respect to a public corporation, exists in any sovereign State, and must, of course, have existed in the absolute monarchy of Spain, where the property of private corporations and individuals was to a great degree subject to the royal will and pleasure." (*Hart* v. *Burnett*, 15 Calif. 569.) And referring to objections to the theory of absolute title in the pueblo, and the questions which upon that view might be suggested, the court said: "There is but one sensible answer to these questions, and we think that answer is given in the laws themselves, and in the recorded proceedings of the officers who administered them, and who must be presumed to have interpreted them correctly. It is, that the lands assigned to pueblos, whether by general law regulating their limits to four square leagues, or by special designation of boundaries, were not given to them in absolute property, with full right of disposition and alienation, but to be held by them in trust for the benefit of the entire community, with such powers of use, disposition and alienation, as had been already or might afterward be conferred for the due execution of such trusts, upon such pueblos, or upon their officers." (Id. 573.) And this view, the court adds, fully reconciles the apparently conflicting disposition of the laws and the commentaries of publicists respecting the relative rights of the Crown and the municipalities to which counsel had referred.

> In this view of the nature of the title of the pueblo and of the city, its successor, I fully concur.

See also *Grisar* v. *McDowell*, 6 Wall. 373, cited in *United States* v. *Santa Fe*, 165 U. S. at pages 708 and 713.

Moreover the title which this court in the *Knight* case declared invalid as against a private estate in the reclaimed land derived from the pueblo, originated in a deed from the tideland commissioners of the State. But as pointed out in *Tripp* v. *Spring*, 5 Sawy. 209, 211, and in the *Knight* case, at pages 193, 194, the superior rights of claimants under the pueblo title had been theretofore fully recognized by the State in consequence of confirmatory legislation recognizing city boundaries identical with those established by the decree of confirmation. Hence, although the parcel in dispute in the *Knight* case may have been, on the admission of California, below high water mark of Mission Creek, the claim of the State thereto had been barred by this recognition. The title, therefore, had elements of validity wholly absent from that presented in the case at bar. Here it cannot be pretended that the State of California had ever assented to the survey which excluded her from ownership of 663 acres of her public domain.

The effect of the confirmation of the pueblo claim was simply to place four square leagues of California soil within the bounds of one of her municipalities. Dominion over navigable creeks and inlets

and other public places within this area passed under trusts for purposes recognized as wholly within the control and direction of State legislative power.

The only case in which the question of the jurisdiction of the land court to deal with California's submerged lands in favor of a private claimant can be regarded as having been remotely mooted is *Teschemacher* v. *Thompson*, 18 Calif. 11. The land there actually in dispute lay between the spring tide and the neap tide and would have been, of course, technical public lands of the United States. The same is true of the parcels in dispute in *Ward* v. *Mulford*, 32 Calif. 365, and *Valentine* v. *Sloss*, 103 Calif. 215, in which cases *Teschemacher* v. *Thompson* is cited. Lands of this character are admittedly within the jurisdiction of the land court. The court, however, in *Teschemacher* v. *Thompson* undertook to decide the case *upon the assumption* that the controversy involved lands below the line of ordinary high tide. It is thus manifest that the case is without value as a precedent, and that the views expressed, while entitled to respect, are not authoritative.

The power of the land court to divest California of her dominion in favor of a private Mexican claimant was not debated. It was assumed in the opinion without argument. Moreover, it is to be noted that in the brief of counsel no point was made denying the jurisdiction of the land court and quite evidently the question was not considered, although the effect of the decision is to assume the point.

II.

The effect of the decree of confirmation as a limitation of the powers of the land department.

By the Act of March 3, 1851, and its amendments, a dual agency was set up and the limit of the duties from time to time assigned respectively to each must be clearly understood.

To the commission was assigned the judicial duty of settling the validity of all Mexican claims; to determine the acreage of quantity claims or "floats," and to settle the metes and bounds of parcels definitively granted by the Mexican government. *Hornsby* v. *United States*, 10 Wall. 224.

To the land department was assigned the duty of locating floating grants and in respect of definitive grants to link them with the public system of surveys by running out, on the ground, metes and bounds theretofore set forth in the decree of confirmation. *United States* v *Hancock*, 133 U. S. 193, 196.

Under section 13 of the original Act and under the Act of June 14, 1860, c. 128, 12 Stat. 33, a *supervision* of surveys was confided to the commission and these could be by it corrected through *judicial order*. *Dominguez* v. *Banning*, 167 U. S. 723, 737–739. Because of the remedy thus afforded it was held in that case that *fast land* constituting parcel of the *public domain of the United States* passed or did not pass to the Mexican claimant according as such fast land was within or without the lines of the *survey* embodied in the patent and that the terms of the

decree of confirmation would not be collaterally looked to to vary this result.

However, by the Act of July 1, 1864, c. 194, 13 Stat. 332, the Act of June 14, 1860, *supra*, was repealed (*Cragin* v. *Powell*, 128 U. S. 691, 697), and judicial power theretofore exercised to revise or correct was extinguished. Hence when the survey in the case at bar was made (1867), control of it lay with the federal land department.

The Government does not contend that, in respect of swamp lands or high lands or any other class of lands subject to sale or other disposition by Federal laws, or of the character technically defined as "public lands" or "public domain," patents of Mexican claims issued by the land department in pursuance of its functions under the Act of March 3, 1851, and its amendments, can be collaterally assailed. This contention would seem foreclosed by the reasoning in *Dominguez* v. *Banning*, *supra*.

It does, however, most earnestly insist that the independent jurisdiction and authority of the land department to function in respect of permanently submerged lands not a part of the technical public domain must, if it exists, be sought in the text of the Act of March 3, 1851, and amendments. Apart from these statutes the land department possesses no power to adjudicate questions of title. *Iowa* v. *Rood*, 187 U S. 87, 93. Furthermore, by the true construction of the statute its independent juris-

diction was plainly limited to the duty of laying down on the official surveys of the technical "public domain" the dividing lines between the portion belonging to Mexican claimants and the portion belonging to the United States. The arguments upon which this position is based are obviously the same as those which have already been stated under point one in respect of the jurisdiction of the land commission.

But in this place the Government contends secondly that the powers and jurisdiction of the land department have another and a further limitation; that they are restricted by the terms of the decree of confirmation and under this head it presents two points:

1. The decree of confirmation read as a single document and construed in accordance with all applicable rules of conveyancing does not include any land below the ordinary high water mark of the peninsula.

The descriptive boundary here in debate is written in the Mexican grant as follows:

> "West by the bay or anchorage for ships."
> R. 27.

Without rehearsing the chain of title appearing on pages 8–10 of its brief, the Government again respectfully urges that this description was adopted by express reference in the petition to the land commission (R. 28) and again adopted in the decree of confirmation. R. 33. It is true that in the latter

the word "bay" is left out and that the call reads: "West by the anchorage for ships," but the decree by reference explicitly incorporates the petition which in turn incorporates the Mexican patent. No claim was put forward in the pleadings and there was no adjudication involving lands outside the peninsula of San Diego, and the omission of the word "bay" in the decree was obviously a mere draftsman's oversight. It has no legal consequence. Either phrase "bay or anchorage for ships" or simply "anchorage for ships" are words descriptive of waters and denote the contiguous body of water by which the peninsula of which confirmation was asked was aptly and exactly bounded. No trained conveyancer, interpreting the decree without the aid of the construction put upon it by the surveyor, would willingly admit that any lands below high water mark were described or included in it. Lands bounded by a sheet or body of navigable water, locally known as the "anchorage for ships" or as "the bay or anchorage for ships," are bounded by the high tide mark of the water. *Shively* v. *Bowlby*, 152 U. S. 1, 29.

2. Such being the only plausible or reasonable construction of the decree when considered by itself and as a *single* document or muniment of title, what is to be said as to its conclusiveness and as to the authority of the land department to vary its terms in a case where an unmistakable bound requiring no location on the ground is named therein and fixed thereby?

It is clearly implied by *Dominguez* v. *Banning*, *supra*, that a departure from the terms of a decree of confirmation, whereby portions of the "public lands" as technically defined are erroneously or wrongfully included in a survey, does not furnish ground on which the patent based thereon can be collaterally assailed.

Nevertheless, the land department is so far controlled by a decree of confirmation that, whenever that decree fixes an unmistakable and definite bound running along high tide mark of navigable water—thereby defining the boundary between the private claimant and the public property of a sovereign state—the land department is then wholly without power or jurisdiction to depart from the decree and thus to extinguish, by its survey and patent, the title of the State. This latter proposition, it is believed, is fully sustained by the following cases:

> *Tripp* v. *Spring*, 5 Sawyer, 209, 215;
> *United States* v. *Hancock*, 133 U. S. 193, 196;
> *Packer* v. *Bird*, 137 U. S. 661, 672;
> *Knight* v. *Land Ass'n.*, 142 U. S. 161, 182–184.

The conclusiveness of the metes and bounds definitively established by the land commission is thus stated by this court in *United States* v. *Hancock* (p. 196):

> It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwith-

> standing there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries. "When a decree gives the boundaries of the tract to which the claim is confirmed, with precision, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." *United States* v. *Halleck*, 1 Wall. 439; *United States* v. *Billing*, 2 Wall. 444; *Higueras* v. *United States*, 5 Wall. 827. And the act of Congress of July 1, 1864, 13 Stat. 334, §7, requires the surveyor general, "in making surveys of the private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim."

So also in *Packer* v. *Bird*, it is said (p. 672):

> In *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 288, the court said that in view of this legislation and other similar acts it did not "hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." The same rule

> applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream.

Tripp v. *Spring*, like *Knight* v. *Land Ass'n*, involved a parcel below high water mark of Mission Creek. It was decided in 1878 by Justice Field, who had, as circuit justice, himself handed down the decree binding the pueblo of San Francisco by the "bay of San Francisco," meaning thereby high water mark crossing inlets and creeks from headland to headland. As pointed out in the *Knight* case (page 171) the first survey of the pueblo by Stratton (subsequently approved by the surveyor general and November 11, 1878, by the commissioner of the land office) departed from the terms of the decree because the surveyor ran his lines, not across Mission Creek from headland to headland, but following high tide line up to the head of the creek, crossing over and coming down to the bay again on the other side.

The invalidity of this action of the surveyor whereby a definite boundary fixed by a decree was altered by the land department assuming to act under authority of the Act of July 1, 1864, *supra*, is thus characterized by Mr. Justice Field (p. 215):

> The suggestion that the survey of the pueblo claim forwarded to the land department at Washington, follows the banks of Mission creek,

> cannot have any weight in the case. The decree confirming the claim of the city fixes the bay of San Francisco at ordinary high-water mark as its eastern boundary, and this line cannot be changed by the surveyor-general, or any department of government. . . . Any patent of the United States which may hereafter be issued to the city from the land department at Washington can neither add to nor take from the title already vested in the city and those claiming under it. The confirmation approved and affirmed by the act of congress will control any patent which the department may issue. * * *

In *United Land Ass'n* v. *Knight*, 85 Calif. 445, it was held that when a decree of confirmation settled the boundaries of a confirmed grant by reference to unmistakable marks fixed by nature, it was not within the province of the land department to depart from them, and that its action in so doing was wholly void and subject to collateral attack. The judgment was reversed by this court but not on the points just stated. The California Supreme Court in the *application of this principle* went on to say that by the terms of the decree of confirmation the bounds of the pueblo of San Francisco followed the banks of Mission Creek and that the second survey and the patent cutting across the mouth of Mission Creek failed to follow the decree.

On this point alone—the proper construction of the text of the decree of confirmation—the judgment of the California court was reversed by this court.

Knight v. *Land Ass'n*, 142 U. S. 161, where it was said (pp. 182, 184):

> The only remaining question in the case, as we understand it, and as we desire to consider it, may be thus stated: Admitting that the Von Leicht survey is correct and follows the decree of confirmation; admitting, also, that the patent followed the survey and the decree, and that the premises in dispute are embraced in the patent: Was parol evidence admissible to show that these premises were below the ordinary highwater mark—not of the bay of San Francisco, but of *Mission Creek*, a navigable arm of the bay, as that line existed at the date of the conquest from Mexico in 1846? * * *
>
> If we have succeeded in showing that the tract in dispute was part of the land claimed by the city of San Francisco as successor of the Mexican pueblo of that name; that it is within the four square leagues described in the decree of the United States Circuit Court for the district of California, entered May 18, 1865; that that court decided and decreed that the claim of title was valid under the laws of Mexico; that the official survey of the United States officers is correct and followed the decree of confirmation; and that the patent of the government of the United States, following the survey and decree, embraced within its calls the property in dispute; we think it clearly follows that the patent of the government is evidence of the title of the city under Mexican laws, and is conclusive, not only as against the government and against all parties

> claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court.

From the foregoing it appears with unmistakable clearness that the title derived from San Francisco was sustained because—

(1) The land was a parcel of premises claimed by the city as successor of the Mexican pueblo.

(2) It was within the *bounds described* in the decree of confirmation of May 18, 1865.

(3) The parcel was held by a valid Mexican title as *held and decided* by the federal court.

(4) The official survey was *correct* and *followed* the decree of confirmation.

(5) The patent followed the survey and *decree* and embraced the property in dispute.*

In the case at bar the facts as to the title are precisely the reverse of those upon which that set up in the *Knight* case was held unassailable. Here no claim to the submerged lands was set forth in the petition for confirmation. The court did not and could not have decided that this acreage was held by a valid Mexican title bacause (a) it was not within the granting power of the territorial governor; (b)

* In Mr. Justice Field's concurring opinion, pp. 206–209, it is also pointed out that the error of the court below lay in assuming that the decree of confirmation called for any line other than the one actually surveyed and embodied in the pueblo patent.

it was not in fact included in the Mexican patent; (c) it was not claimed in the petition. The court's adjudication was confined to the fast land claimed and described in the petition and known by the name of the Island or Peninsula of San Diego. It was not within the bounds set forth in the decree of confirmation and the official survey made years afterwards was incorrect and failed to follow the decree.

Since the survey and patent were not the acts of the court interpreting the language of its own decree, but merely ministerial acts performed by officers whose errors the court possessed no jurisdiction to correct, it follows that their action was void on the analogy of cases like *Salt Lake Inv. Co.* v. *Oregon Short Line*, 246 U. S. 446, and other cases cited.

Moreover, since the Government is here only as the condemning party and entitled to an investigation of the title to these tidelands to the end that the award may be distributed to the true owner thereof, it insists that Coronado Beach Company has not acquired a prescriptive title against California, the true owner, by virtue of the Act of March 3, 1891, c. 561, 26 Stat. 1099, §8. The claim of California to these lands is not affected by this statute. They were never public lands. *La Roque* v. *United States*, 239 U. S. 62, 68.

A vital distinction between *Dominguez* v. *Banning* and the case at bar lies in this: that in respect of "public lands" a mistake of the surveyor binds both *parties to the judgment* because these lands *belong*

either to the United States as "public domain" or to the claimant under his Mexican title; but in respect of lands under navigable waters, since California is not a party except by a fiction, the mistake does not bind the State unless it be shown that the survey and patent encroaching on navigable waters is justified and authorized either by an Act of Congress passed to carry out a treaty or at least by the decree of a court constituted by an Act of Congress. It has never heretofore been held that the *State's title* was capable of destruction on the foot of treaty obligation by anything short of a *decree*. It is argued that the State took as successor in title to the federal government, but more justly, her sovereign dominion and ownership had birth in the Constitution by force of which her admission clothed her with equality of rights with her sister States. Subject as these rights were to treaty claims, the settlement of these obligations was not delegated to administrative officials and her rights left to the hazard of their mistakes or misprisions. At most, the treaty obligation must be declared by a *court*.

III.

The quality and incidents of title to submerged lands under the law of California.

On the assumption that Coronado Beach Company had title to the submerged lands adjacent to its fast land, the court below inquired of counsel in regard to the extent or quality of its ownership. R. 41, 42.

The reply was that its right was to utilize these tidelands without a franchise as private owner. This theory of practically unrestricted private ownership was the basis of the expert testimony and of the verdict appraising the fast lands at a sum exceeding the Government's estimates by more than $3,000,000. Yielding to the owner's contention as to the quality of its estate, the jury was instructed (R. 105, 107, 111–112):

> The land in question whose value you are to fix, and which has been described in the act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the anchorage of ships, and the line of that anchorage is precisely defined by the United States survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence. Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation, and in this respect I instruct you that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed as it has been, beyond which a solid fill is not permissible without consent of the Government, and that it is

> likewise a reasonable public regulation that the pierhead line be fixed as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers, warehouses, terminals, or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands. And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same was derived from the former Government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the Government by the survey and patent.

It should be stated here that, considering this ruling, the instruction was the *law of the case* and hence, obviously, it was not necessary that the Government object or except to *evidence* admitted on this legal theory. It was only necessary to except to the ruling.

In the oral argument it was insistently urged that the Government's exception went only to that part of the quoted ruling which dealt with the

naked legal title to the submerged land and did not cover the court's definition of the quality or character of the title and the legal incidents annexed to it. Emphasis was put upon the following colloquy appearing at pages 104–5 of the record.

> The COURT. Are there any exceptions, gentlemen, to the charge to the jury?
>
> Mr. DENIS. The government has none, excepting the refusal of the court to charge as requested by the government in the last instruction, in regard to tidelands. And then the government also desires to except to the instruction with reference to the title to the submerged lands. With these exceptions I know of no other instruction.
>
> The COURT. You particularly refer to the instruction that the patent extends out to the anchorage? Including 663 acres?
>
> Mr. DENIS. The whole of that instruction; yes, your Honor; those are the only two.
>
> The instructions given by the court and excepted to by plaintiff reads as follows: (Here follows the instruction in full as already quoted, *supra*.)

In the opinion recently handed down no reference to the assignment of error (R. 111–12) taken on the whole of this instruction appears, possibly because it was considered that the exception was not duly saved at the trial. Consequently, before discussing the substantive question the procedural point will be adverted to.

As the record shows the question of mere titular ownership was of slight importance. The exagger-

ated appraisal of the fast land depended on the right to *utilize* this titular ownership without a franchise as private property free of any state control or future federal control. It would seem obvious therefore that question as to the existence of this estate was inseparably bound up with its incidents and the rights annexed to it. Consequently, the court, having ruled that private ownership extended to the so-called anchorage, undertook to define the incidents of the estate, instructing the jury that the Coronado Beach Company had all the rights of full ownership subject to reasonable public regulation, and furthermore proceeded to define with precision the extent of reasonable public regulation, instructing the jury that it consisted in the right of the Federal government to establish present bulkhead and pierhead lines only, and following this by the flat declaration that it was a property right and an attribute of ownership of the Coronado Beach Company that it might construct wharves, docks, piers, warehouses, terminals or other improvements on these submerged lands *subject to these regulations;* and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately-owned tide-lands.

Counsel for the Government excepted to the *whole* of that instruction. Since the vital thing in the ruling was the extent or quality of the ownership and the use to which the owner was free to put these

lands, it is much too narrow to say that the exception must be construed as applying only to the question of naked legal title. It went to the whole; both title and the defined incidents thereof. But this is not all. On pages 107–8 of the bills of exceptions appears a "Specifications of errors of law occurring at the trial," in which the entire instruction is included. R. 107. This was allowed, signed and sealed and made by the court a part of the bills of exceptions. Since not only title but the extent of plaintiff's rights under it was (as shown R. 41–2) in debate and was a vital issue, this court is not bound by any strained and narrow construction of the particular colloquy transcribed on pages 104–5. The government may properly insist that the full instruction appearing on page 107 was excepted to and that the exception was admitted and formally embodied in a *bill of exceptions* by the court below.

The substantial injury resulting from the instruction has been argued in the government's brief, 46–54. The jury was told that private ownership of the submerged land was subject to *existing* federal regulation only, and the fast lands were valued and the appraisal augmented because of such exclusive private ownership and the accompanying freedom to utilize as private owner the submerged lands. The jurors were not instructed as to undoubted federal power hereafter, without compensating the owner, to move back existing harbor lines and to

forbid private structures beyond them. *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251.*

The existence of concurrent regulatory powers possessed by the State of California (*Cummings* v. *Chicago*, 188 U. S. 410, 431), who, in her legislative discretion, might demand that this harbor entrance in the interest of navigation, fishing, etc., be kept free of all private obstruction, was ignored by the court and necessarily also by the jurors in weighing evidence and appraising values.

From these considerations emerges the legal question to be decided. What is in fact the nature and quality of the incidents annexed to titular ownership of submerged lands derived from a confirmed Mexican grant.

It has been settled by this court that this is a question of local or general law and that the quality of the estate was not defined or determined by the

*In that case it was held that a wharf, recognized as property by State law and, moreover, built within harbor lines already established by the Federal government, must be removed without compensation when, thereafter, in order to widen the available fairway, the Secretary of War established new harbor lines farther in shore, although the immediate purpose of government might have been to provide space for mooring or maneuvering the vessels of the navy. Is it not equally true that in developing aeroplane bases existing harbor lines may be changed and obstructions beyond forbidden to permit open water spaces like this to be utilized as landing places and maneuvering grounds for naval hydroplanes. To illustrate, assume that, instead of North Island, a site on the opposite shore had been chosen for this air station and that unobstructed use of the water covering these submerged lands had been found essential to its operation. It could not be contended that power to move back existing harbor lines might not be exercised although thereby private commercial development of North Island might be impeded or rendered impossible. This again is but an instance of the fallacy that private rights of ownership of lands submerged by navigable water are beyond legislative control or that they are possible or conceivable except as a result of *legislative license* to wharf out, etc. *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387, 452.

confirmation had under the Act of March 3, 1851. *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217.

The inquiry, therefore, is what is the California rule in regard to such ownership. Does title to submerged lands in California derived from Mexico invest the owner with the right to improve them without a franchise from the state, as claimed by counsel. No authority on this precise point has been found. In *People* v. *California Fish Co.*, 166 Calif. 576, 138 Pacific 79, the strictly qualified nature of the title to tidelands acquired by *state grant* is extensively discussed and accurately defined.

These lands are not tidelands; they are permanently submerged under navigable water. It is too clear for debate that if the question were presented to the California courts, the restrictions and limitations on the title set forth in the case just cited would be applied with equal or greater emphasis to the lands here in question.

Since, in the case at bar, it would be necessary for the court to determine what the local law is in regard to these lands, it is submitted with confidence that the cited case is persuasive authority and that no greater rights flow from ownership of submerged land derived from Mexico than are annexed to such ownership when derived from the state.

That confirmation of a Mexican title divests the Federal government of its control of navigable water resting upon the soil forming its subject is hardly arguable. Such property is onerated with servitudes perpetually restricting its free private use.

The court is therefore respectfully urged, in view of the foregoing considerations, to grant a rehearing of the case.

April, 1921.

LESLIE C. GARNETT,
Special Assistant to the Attorney General.
CHARLES S. LAWRENCE,
Attorney.
WILLIAM L. FRIERSON,
Solicitor General.

I hereby certify that the foregoing petition for rehearing is, in my opinion, well founded and that it is presented in good faith.

WILLIAM L. FRIERSON,
Solicitor General.

CHAP. XLI.—*An Act to ascertain and settle the private Land Claims in the State of California.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted*, That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted*, That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted*, That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency

as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted*, That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted*, That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted*, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpœna commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted*, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present

claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trail, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of

the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted*, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted*, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted*, That all the lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners

within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been

finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

SEC. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be

conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted*, That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpœna. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpœna, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

APPROVED, March 3, 1851.

○

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 524

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CORONADO BEACH COMPANY
Defendant.

In Error to the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

P. F. DUNNE,
MORRISON, DUNNE & BROBECK,
READ G. DILWORTH,
Attorneys for Defendant.

Subject Index.

Pages

STATEMENT OF THE CASE 1-10

1. This brief pertains to the matter of "appraisement" 1
2. Boundaries of the land in question herein 2-3
3. Errors assigned by plaintiff 3-10
4. Desire of court and counsel that appraisement be final 4
   (a) Three verdicts proposed by counsel for plaintiff 4
5. The verdicts of the jury 5-6
6. The judgment 6-9
7. No question as to amount of verdict involved here; principal question is as to whether title to tidelands was a proper subject of appraisement 10

I. UNDER THE ACT OF JULY 27, 1917, C. 42, 40 STAT. 247, THE JUDGMENT OF THE DISTRICT COURT IS NOT REMOVABLE TO THIS COURT, FOR THE EXERCISE OF APPELATE JURISDICTION, BY WRIT OF ERROR 10-16

1. This proceeding involves more than the simple exercise of the power of eminent domain, it involves, as well, "matter of equitable cognizance" 11-12
2. The statute (C. 42, 40 Stat., 247) which rules this proceeding makes no provision for a writ of error 12
3. Appeal and writ of error distinguished 12-16

II. THE WESTERN BOUNDARY OF "THE WHOLE OF NORTH ISLAND" IS PRECISELY DEFINED TO INCLUDE THE TIDELAND AREA, BY THE UNITED STATES PATENT AND THE PLAT OF SURVEY ACCOMPANYING THE SAME AND A PART THEREOF. THE STATE OF CALIFORNIA, AS OF ITS SOVEREIGN STATUS, NEVER HAD TITLE TO

Pages

THESE PARTICULAR TIDELANDS, LYING INSIDE OF THE BOUNDARY LINE FIXED BY THE UNITED STATES SURVEY WHICH SUPERVENED UPON THE DECREE OF CONFIRMATION AND ACCOMPANIED THE PATENT. THESE PARTICULAR TIDELANDS, BY ELDER AND PATENTED TITLE, PASSED IN FEE SIMPLE ABSOLUTE TO THE MEXICAN GRANTEE, OR HIS SUCCESSORS IN INTEREST, PURSUANT TO THE CONFIRMATION OF THE MEXICAN GRANT 16-43

1. The Crown or the Mexican Congress could for the common benefit grant the seashore for appropriate purposes 17
2. Mexican Grants including tidelands were made under the former government of California, and were recognized and protected by the United States under the law of nations and under the Treaty of Guadalupe Hidalgo..... 17
3. The jurisdiction of the Board of Land Commissioners and the courts, under the Act of March 3, 1851, extended to the final and conclusive determination, as between the claimant and the United States, of every question affecting the validity of the claim and this included the authority of the governor to make the grant, as well as the existence or effect of the laws of Mexico concerning the same.... 17-43
   (a) Purpose of the Act of March 3, 1851 was to give repose to titles..... 20
   (b) The tidelands in question here were the subject of a grant by the Mexican Government, previous to the admission of the State of California, and were unaffected by any ownership in the future State..... 21-22
   (c) The Patent of the United States established the title of the patentee of these tidelands from the date of the grant, and the official survey conclusively defined the boundaries.. 22-43

Pages

III. THE PUBLIC RIGHT OF NAVIGATION AND FISHERY, AND THE PUBLIC REGULATION OF THE SAME, ARE NOT IN QUESTION HERE 43-49

1. The instruction of the court as to the private ownership of the tidelands and its right to use them, subject to reasonable public regulation, is correct 43-46

2. No question as to the right of public regulation was involved in the exception to the instruction taken below 46-49

IV. THE APPRAISEMENT, UNDER THE ACT OF JULY 27, 1917 (c. 42, 40 Stat., 247) IS OF THE WHOLE OF NORTH ISLAND, NOT SOME PART; AND THE WHOLE OF NORTH ISLAND, FOR THE PURPOSES OF THE APPRAISEMENT, IS MEASURED BY "ANY RIGHTS PRIVATE PARTIES MAY HAVE IN THE SAID ISLAND OVER AND BEYOND ANY RIGHTS THERETO IN THE UNITED STATES" 49-67

1. The United States, by a conclusive and unvacated record—the patent and survey—has located and defined this land, and has fixed its western boundary 49

2. When the United States authorized "the appraisement of any rights private parties may have in the said island (whole of North Island) over and beyond any rights thereto in the United States", it knew, by its own record, the source, character, extent and definition of the rights of the defendant 49-50

3. Proper construction of the Act of July 27, 1917, c. 42, 40 Stat. 247 50-67

(a) Report of Committee on Military affairs of the House of Representatives 51-67

(b) Report of the Senate Committee 54

(c) Declarations of certain army and navy officers 55-63

Pages

V. THE INSTRUCTIONS TO THE JURY "AS TO THE TITLE TO, AND CHARACTER OF OWNERSHIP OF, LANDS UNDER NAVIGABLE WATERS", WERE PROPER INSTRUCTIONS, AND NO ERROR IS PREDICABLE THEREOF ..... 67 - 87

1. The State of California is not the owner of all land bordering upon the tidewaters within the State, nor is the private ownership of all lands bordering thereon limited by the ordinary high water mark ..... 68 - 69
2. Plaintiff itself requested the court to instruct the jury to find the value of the land claimed by the defendant as a unit and as a whole, specifying the full acreage—2147 acres and defendant was entitled to offer responsive evidence..... 69 - 70
3. No objection was made by plaintiff to the form or language of the verdicts rendered by the jury or to the instruction submitting the same nor was any instruction proposed by plaintiff asking any discrimination in the application of the evidence as between one form of verdict and another ..... 71 - 79
4. There was no error in admitting the map or diagram for the purpose of illustrating the testimony of the witness..... 79 - 87

CONCLUSION — PROPOSITIONS SUBMITTED ARE RECAPITULATED ..... 87 - 88

List of Cases Referred To.

Pages

Allis v. U. S., 155 U. S. 117, 122 48
American Construction Co. v. Jacksonville Railway, 148 U. S. 372, 378 16
Barker v. Harvey, 181 U. S. 72, 77 21
Barry v. Mercein, 5 How. 103, 119 ..... 13, 14
Beard v. Federy, 3 Wall. 478 ..... 17, 19, 25, 33, 34, 35
Beaver v. Taylor, 93 U. S. 46, 55 47
Boquillas Cattle Co. v. Curtis, 232 U. S. 342 42
Boom Co. v. Patterson, 98 U. S. 403, 408, 409, 410 77
Burton v. Griggs, 20 Wall. 125, 133 75
Carino v. Insular Government, 212 U. S. pp. 459-460 32
Cragin v. Powell, 128 U. S. 696 49
Davis v. Seybold, 195 Fed. 402, 412 49
Doolan v. Carr, 125 U. S. 618 35
Dower v. Richards, 151 U. S. 658, 663 ..... 14, 15
Goodtitle v. Kibbe, 9 How. 471 24
Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 262 46
Hanna v. Maas, 122 U. S. 24, 26 74
Hutchins v. King, 1 Wall. 53, 60 74
Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 72 48
Jover v. Insular Government, 221 U. S. 623, 629 ..... 16, 17
Knight v. U. S. Land Association, 142 U. S. 161, 163, 201 ..... 24, 37, 68
Kentucky v. Powers, 201 U. S. 1, 24 13
Los Angeles v. Farming & Milling Co., 152 Cal. 645; 217 U. S. 217 ..... 41, 42
Los Angeles Milling Co. v. Thompson, 180 U. S. 72; 117 Cal. 594 ..... 18, 19, 20
Mays v. Fritton, 21 Wall. 414, 418 71
Moore v. Shaw, 17 Cal. 201, 226 51
Penn. R. Co. v. International Coal Co., 230 U. S. 184, 199 51

Pages

R. Co. v. District of Columbia, 195 U. S. 328, 329..... 11
Railway Co. v. Holloman, 114 Pac. 700, 701.....83-84
Railway Co. v. Longworth, 30 Ohio St. 111, 112.....82-83
Railway Co. v. Moore, 15 N. E. 764, 766..... 85
Rhode Island v. Massachusetts, 12 Pet. 657, 720..... 12
Rock Island, etc. Co. v. Gordon, 59 N. E. 810, 811.....84, 85

St. Clair v. U. S., 154 U. S. 134, 153..... 74
San Francisco v. Le Roy, 138 U. S. 656, 670, 671, 672....29, 68
Savings Union v. Petroleum Co., 144 Cal. 134, 137..... 46
Shipbuilding Co. v. Hagg, 219 U. S. 175, 179..... 13
Shively v. Bowlby, 152 U. S .1, 26, 29, 30, 40, 47, 48, 50
58 .....37-41, 68

Teschemacher v. Thompson, 18 Cal. 11, 22, 27, 28....21-24, 68
The Francis Wright, 105 U. S. 381, 385..... 15

Union Terminal R. Co. v. Peet Bros., 48 Pac. 860, 861..80-82
Upton v. McLaughlin, 105 U. S. 640, 646..... 75
U. S. v. Fossatt, 21 How. 445, 448.....17, 18
U. S. v. Freight Assoc., 166 U. S. 290, 318.....50, 51
U. S. v. Goodwin, 7 Cranch. 108, 110, 111..... 14
U. S. v. McMasters, 4 Wall. 680, 681, 682.....49, 75
U. S. v. More, 3 Cranch. 159, 171..... 14
U. S. v. Pacheco, 2 Wall. 590..... 38
U. S. v. St. Paul etc. Ry. Co., 247 U. S. 310, 318..... 51
U. S. v Workman, 1 Wall 745..... 18

Wasatch Co. v. Crescent Co., 148 U. S. 293, 298..... 74
Wilson v. Equitable Gas Co., 152 Pa. St. 156.....77, 78

Yates v. Milwaukee, 10 Wall. 497, 504..... 46

MISCELLANEOUS.

Congress. Rec. Vol. 55, pt. 5, p. 5100.....64-67

House Doc. Vol. 32, Doc. 1946, pt. 3..... 54
House Report, Vol. I, 65th Cong., 1st Sess.....51-54

Senate Report, Cong. Rec. Vol. 55, pt. 5, p. 5100..... 54

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 524

THE UNITED STATES OF AMERICA,
Plaintiff.

vs.

CORONADO BEACH COMPANY
Defendant.

In Error to the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

Statement.

This brief pertains to the transcript of record, entitled as above, bearing the number 524. It is addressed to the matter of "Appraisement".

The "Determination of any rights"—of the title—of The Coronado Beach Company, to "the whole of North Island" is considered in the brief of The

Coronado Beach Company, which pertains to the transcript of record, bearing the number 525. To that brief, as to this, we have attached a replica of the delineations of the plat which accompanies the patent, and which expresses the delimitations of the peninsula, not island, covered by the grant and patent. North Island, so called, is not an island, but part of a peninsula. (Photographic copy of the plat will be found against page 114 of the transcript in No. 524.)

As will be seen by reference to the brief in No. 525, which, perhaps, may be read first in order, the Act of Congress on which the proceeding goes, refers to the tract of land in question as "the whole of North Island". So does the bill of complaint (Tr. p. 4.) The original grant recites that the land

> "is bounded on the north by the Estero (Bay) of the Port of San Diego towards the town, east by the end of the Rancho of San Augustin Melisse, south by the sea, and west by the Bay or *Anchorage for Ships*, as explained by the map which goes with the Espediente" (Tr. p. 27).

A glance at the map attached to this brief, or at the plat of survey, accompanying the patent, will show that the boundary on the west "by the bay or anchorage for ships", takes in the tide land forming the western part of North Island. This western boundary of North Island is designated in the map attached to this brief, as "U. S. Grant Line"; and in the original grant, as "anchorage of ships" (Tr. p. 27); and in the decree of con-

firmation, as "Anchorage for Ships" (Tr. p. 34); and in the plat of survey accompanying the patent, as "Anchorage for Ships" (Tr. p. 114).

Error has been assigned by plaintiff to the action of the district court in refusing to give the jury this instruction:

> "You are instructed that *the State of California* is the *owner* of all land bordering upon tidewater within the state, which is below the ordinary high water mark. Therefore the *private ownership* of land bordering upon tidewater in this state can *only* extend to the ordinary high water mark" (Tr. p. 107).

To the contrary, the district court gave to the jury the following instruction, to which error is also assigned:

> "The land in question whose value you are to fix, and which has been described in Act of Congress as *the whole of North Island*, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of Ordinary high tide. That ownership is extended out by the United States patent, and by the law of this case, to the Anchorage of Ships, and the line of that anchorage is precisely defined by the United States Survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence" (Tr. p. 107).

The instruction thus quoted expresses the position of this defendant, so far as the granted, confirmed and patented land in this particular case is con-

cerned,—in opposition to the claim made by counsel for the government in the rejected instruction, that the ownership of the tideland of North Island, though defined by grant, decree, survey, and patent, rested, nevertheless, in the State of California.

These opposing contentions had been presented to the district court, just in advance of the actual hearing upon the appraisement. It was the decree of the district judge, and, as well, the position taken by counsel for the government, that the appraisement arrived at should, in whatever aspect, be a final one. The court had remarked that the argument of counsel for The Coronado Beach Company,

> "that his patent carries the title to this . . . land out to this survey (anchorage of ships), has impressed the court very forcibly, and I would like to have a proceeding here that would be final";

whereupon counsel for the government proposed the course, adopted by the court, of taking three verdicts.

> "If your Honor please", he said, "I expect to ask the court to instruct the jury to find three verdicts: one, the value of the land claimed by the defendant, 2,147 acres; another, the value of the land within the high water, 1,297 acres, less a small body of land belonging to the government; third, the value of the land outside of the upland, in other words, the tide and submerged lands. Your Honor made that suggestion months ago, and neither side could see its way clear; but as the case has shaped itself, the government expects to ask you to instruct the jury to find those three verdicts.

> The COURT. The burden of deciding what is North Island will be greatly lessened on this court, if we can get a verdict specifying the damages separately as to those items; and I apprehend that when such a verdict goes to the Supreme Court, that they could arrive at a correct judgment and end the case" (Tr. pp. 42-3).

Accordingly, the verdict of the jury was prepared and returned, without objection by the government to the form or manner thereof, appraising, in the first place, the whole of North Island; in the next place, the land lying above high water mark; and in the third place, the tide land. The appraisement of the upland was, itself, separated into the "mesa" (table land, or principal area) land, and into a relatively smaller quantity of "meadow, marsh, and beach land", all lying above high water mark.

The Coronado Beach Company, in its answer, had set the value of the whole of North Island at $7,500,000 (Tr. p. 8). The verdict fixed the appraisement as of August 1, 1917, the date stipulated by counsel, and in terms as follows:

> "VERDICT.
>
> "We, the jury in the above-entitled cause, find that the fair market value of the whole of North Island, as of August 1st, 1917, was $5,000,000 (five million dollars).
>
> ANSWERS TO SPECIAL INTERROGATORIES DIRECTED BY THE COURT.
>
> No. 1. What was the fair market value on August 1, 1917, of the land lying above high-

water mark, containing 1,232.93 acres, more or less, referred to as mesa land?

Answer. $4,625,000.00 (four million six hundred twenty-five thousand).

No. 2. What was the fair market value on August 1, 1917, of the 207.24 acres lying above high-water mark, referred to as meadow, marsh, and beach land?

Answer. $45,000.00 (forty-five thousand).

No. 3. What was the fair market value on August 1, 1917, of the lands lying below high-water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands?

Answer. $330,000.00 (three hundred thirty thousand)." (Tr. p. 106.)

The judgment recites the appearance of the parties by their counsel, the impanelment of the jury, the agreement of counsel upon August 1st, 1917, as the date for the appraisement, the introduction of evidence by the parties, the argument of counsel, instructions of the court, and the submission to the jury (Tr. pp. 17, 18).

The verdict of the jury is then set out in terms, the filing of the same by the clerk, and the entry thereof in the minutes of the court. The fact that the plaintiff, at the time of trial, was, and since August 1, 1917, had been, in possession of the premises for the purposes mentioned in the complaint, is stated, and the court proceeds to adjudge:

(1) Defendant's sole and exclusive ownership in fee simple of the land in question, "free and clear of any easement, estate, interest, right, title, claim or demand of any kind, character or description, of

plaintiff, United States of America, in or to the same, or in or to any part or parcel thereof, for use for the defense or security of the nation, or for any purpose whatsoever" (Tr. p. 19).

(2) That plaintiff "has no easement, estate, interest, right, title, claim or demand, or any kind, character or description, in or to the tract of land hereinafter described, or in or to any part or parcel thereof, for use for the defense or security of the nation, or for any purpose whatsoever, or at all" (Tr. p. 19).

(3) "That the public interest and necessity require that the possession and use of the tract of land hereinafter described, and the whole thereof, be taken and maintained by plaintiff permanently; and that the said tract of land, and the whole thereof, be condemned by plaintiff for use for national defense, and, in connection therewith, as sites for permanent aviation stations for the army and navy, and for aviation-school purposes" (Tr. p. 19).

(4) That the proposed use is authorized by law, and the taking is necessary thereto (Tr. p. 19).

(5) The area of land sought to be condemned was, on August 1, 1917, and now is, 2103.47 acres (Tr. p. 19).

(6) Of this total acreage, 1232.93 acres, more or less, were, on August 1, 1917, and now are, mesa land, lying above high water mark, and 207.24 acres, meadow, marsh and beach land, lying above high water mark; and 663.3 acres, more or less, tide or

submerged lands, lying below high water mark (Tr. p. 20).

(7) (8) (9) (10). These paragraphs repeat the valuations returned by the verdict (Tr. p. 20).

(11) "That the plaintiff, within thirty days after the entry of this judgment, shall pay the defendant, Coronado Beach Company, a corporation, or into court for it, the sum of five million (5,000,000) dollars, that being the amount of the fair market value of the property sought to be condemned by plaintiff for the uses and purposes aforesaid" (Tr. p. 20).

(12) "That upon paying the sum of five million (5,000,000) dollars, hereinabove directed to be paid, the plaintiff, United States of America, will be entitled to a final order of condemnation, particularly describing the property condemned, and stating the purposes of such condemnation, which purposes are hereinbefore set forth" (Tr. p. 21).

(13) "That upon the making, entering, and recording of said final decree of condemnation, the plaintiff herein shall have full right and liberty of using the tract of land hereinafter described, and the whole thereof, for national defense, and, in connection therewith, as sites for permanent aviation stations for the army and navy and for aviation-school purposes" (Tr. p. 21).

(14) "That the tract of land herein sought to be condemned is situate in the Harbor of San Diego, in the County of San Diego and State of California,

and is known, designated, and described as the whole of North Island, in the Harbor of San Diego, California; excepting therefrom, those certain pieces or parcels of land within the exterior limits of the said North Island which are described in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded September 12, 1901, in Book No. 312 of Deeds, at page 185 et seq., of the records of said County of San Diego, California, containing thirty-eight and fifty-six hundredths (38.56) acres, more or less; and in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded in Book No. 211 of Deeds, at page 381 et seq., of the records of said County of San Diego, California, containing eighteen and eighty-five hundredths (18.85) acres, more or less.

"Done in open Court this 1 day of June, 1920,

Trippet, Judge.

"Approved as to form,

George J. Denis,

Special Assistant to the Attorney General.

(Entered and recorded June 1, 1920)" (Tr. p. 21).

The judgment, therefore, while setting forth the several appraisements, returned by the jury, as between upland and tideland, adjudges the amount to be paid at the sum of five million dollars, as for "the whole of North Island"—delimited by the line of the United States Survey and Patent, defining "the Anchorage of Ships".

No error is assigned to the form of the general verdict or of the special appraisements, as submitted to the jury in the instructions of the court. No question as to the amount is involved here. The principal question is presented, as to whether title to the tidelands was a proper subject of "appraisement", as being in this defendant by force of the Mexican grant and patent, as against any title attributable to the State of California. A minor assignment of error to the ruling of the court admitting in evidence, for the strictly limited purpose of illustrating the testimony of the witness, a map or diagram, will be noticed in the sequel.

At the threshold, however, is a question of appellate jurisdiction.

I.

UNDER THE ACT OF JULY 27, 1917, c. 42, 40 Stat. 247, THE JUDGMENT OF THE DISTRICT COURT IS NOT REMOVABLE TO THIS COURT, FOR THE EXERCISE OF APPELLATE JURISDICTION BY WRIT OF ERROR.

It is said in the government's brief, that when the resolution, which afterwards became the Act of July 27, 1917, was reported to the Senate (Cong. Rec., Vol. 55, pt. 5, p. 5100) it was accompanied, as part of the Report of the Committee, by a letter from the Secretary of War. This letter, it is further said, gives the opinion of a joint army and navy board, "that North Island was the best location in the country for the establishment of the joint

army and navy station", and recommends that authority of Congress be obtained for taking possession thereof. This same letter it is to be remarked, refers to the fact "that the title of the claimants to North Island rests on the confirmation of a Mexican Grant". The claim of the government to the "easement" discussed in our brief in No. 525, is mentioned, and it is said:

> "The question is not free from doubt, and it is the view of this Department that the legislation should provide, as in the draft submitted, for the determination of the respective rights of the claimants and the government to these lands, and for the payment to the claimants of the appraised value of any rights they may have in said island over and beyond the rights of the United States in the premises. It is accordingly recommended that the legislation take this form."

Hence it is that the Act of Congress of July 27, 1917, and the proceedings thereunder, involved something more than the simple exercise of the power of eminent domain, which has been said to be "the assertion of a right legal in its nature" (R. Co. v. District of Columbia, 195 U. S., p. 328). And so it was that, in the case just cited, the appeal was dismissed, and the case was held to be examinable only on the writ of error. The Act of Congress which rules the proceeding at bar follows the recommendation of the Secretary of War, and provides for "matter of equitable cognizance" (R. Co. v. District of Columbia, supra, p. 329); "for the determination of the respective rights of

the claimants and the government to these lands", to repeat the language of the Secretary of War. The Act of Congress in terms authorizes "the attorney general or the claimants", either of them, "to make application for the *determination* and appraisement of any rights private parties may have in the said island, over and beyond any rights thereto in the United States, to the District Court of the United States for the Southern District of California"; and, as stated in an opening paragraph of the government's brief, "the bill of complaint was filed in equity". When Congress came, in this self-same statute, to commit the appellate jurisdiction to this court, without interposition of the Circuit Court of Appeals, no provision was made for a writ of error. The appellate jurisdiction was conferred on this court by appeal from the judgment of the district court. The statute reads:

> "Either party *may take an appeal* from the judgment of such court (District Court) direct to the Supreme Court of the United States within ninety days after such judgment is rendered.'

In Rhode Island v. Massachusetts, 12 Pet. 657, 720, it is said:

> "As this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is *coram non judice*, and its action a nullity. And whether the want

> or excess of power is objected by a party, or is apparent to the court, it must surcease its action, or proceed extra-judicially."

And speaking of the appellate jurisdiction, it was said in Shipbuilding Co. v. Hagg, 219 U. S. 175, 179:

> "This court takes notice of its own jurisdiction; and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it. Ry. v. Swan, 111 U. S. 379-382. In that case Mr. Justice Matthews, who spoke for the court, said:
>
> "'On every Writ of Error or Appeal, the first and fundamental question is that of jurisdiction; first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'"

The writ of error was dismissed for want of jurisdiction (p. 179).

In Barry v. Mercein, 5 How. 103, 119, Mr. Chief Justice Taney said:

> "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by Act of Congress; *nor can it, when conferred, be exercised in any other form or by any other mode of proceeding, than that which the law prescribes.*" And the writ of error was dismissed.

"Courts which are created by written law", it was said in a case cited in the government's brief (Ky. v. Powers, 201 U. S. 1, 24), "and whose jurisdiction is *defined by written law*, cannot transcend that jurisdiction".

"When the Constitution," said Chief Justice Marshall (U. S. v. More, 3 Cranch. 159, 171), "has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and Congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception."

"The question, then, is, whether the word appeal, in the twenty-second section (of the Judiciary Act of 1789) is to be understood technically, or merely as descriptive of the appellate jurisdiction of the Superior Court, without regard to *the particular mode* by which a cause is transmitted to that jurisdiction? This question appears to have been considered by the Supreme Court so early as the year 1796, in the case of Wiscart v. D'Auchy. Chief Justice Ellsworth, in delivering the opinion of the court in that case, expresses himself as follows: 'The Act of 1789 speaks of appeal and writ of error, but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil-law process, and removes a cause entirely, subjecting the law and fact to a review and retrial. A writ or error is a common-law process, and removes for re-examination, nothing but the law. This statute observes this distinction'." And the court, in respect to the term appeal, holds that "the legislative meaning of the term is ascertained" (*U. S. v. Goodwin*, 7 Cranch. 108, 110-111).

In Dower v. Richards, 151 U. S. 658, 663, this court said:

"In the legislation of Congress from the foundation of the government, a Writ of Error,

which brings up matter of law only, has always been distinguished from an Appeal, which, unless expressly restricted, brings up both law and fact."

In the case of "The Francis Wright", 105 U. S. 381, 385, this court quotes the language of Mr. Chief Justice Ellsworth, as follows:

"If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply whether Congress has established a rule for regulating its exercise."

And again:

"It is observed that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the congress; and if congress has prescribed a writ of error, *and no other mode*, by which it is to be exercised, still, I say, we are bound to pursue *that mode*, and can neither make nor adopt another."

We have only such appellate jurisdiction as has been conferred by Congress; (U. S. v. Young, 94 U. S. 259) and in the exercise of such as has been conferred, we can proceed *only in the manner* which the law prescribes. From the judgments of the court of claims, *appeals* are allowed to this court; but *no provision has been made for writs of error. Consequently, we cannot proceed by writ of error to review the decisions of that court.*"

And in American Construction Co. v. Jacksonville Railway, 148 U. S. 372, 378, this court said:

> "By the Constitution of the United States, in cases to which the judicial power of the United States extends, and of which original jurisdiction is not conferred on this court, 'the Supreme Court shall have appellate jurisdiction, with such exceptions and under such regulations as the congress shall make'. Constitution Art. 3, Sec. 2. This court, therefore, *as it has always held,* can exercise no appellate jurisdiction, except in the cases, and *in the manner and form,* defined and prescribed by congress."

It is submitted, therefore, that the writ of error should be dismissed.

II.

THE WESTERN BOUNDARY OF "THE WHOLE OF NORTH ISLAND" IS PRECISELY DEFINED TO INCLUDE THE TIDELAND AREA, BY THE UNITED STATES PATENT AND THE PLAT OF SURVEY ACCOMPANYING THE SAME AND A PART THEREOF. THE STATE OF CALIFORNIA, AS OF ITS SOVEREIGN STATUS, NEVER HAD TITLE TO THESE PARTICULAR TIDELANDS, LYING INSIDE OF THE BOUNDARY LINE FIXED BY THE UNITED STATES SURVEY WHICH SUPERVENED UPON THE DECREE OF CONFIRMATION AND ACCOMPANIED THE PATENT. THESE PARTICULAR TIDELANDS, BY ELDER AND PATENTED TITLE, PASSED IN FEE SIMPLE ABSOLUTE TO THE MEXICAN GRANTEE, OR HIS SUCCESSORS IN INTEREST, PURSUANT TO THE CONFIRMATION OF THE MEXICAN GRANT.

It is conceded in the government's brief, as it must have been (Jover v. Insular Government, 221 U. S. 623, 629),

> "that the Crown, or the Congress of Mexico, could for the common benefit limit the general rule of the Civil Law, and grant the seashore for appropriate purposes."

Mexican grants including tidelands, were made under the former government of California; they were recognized and protected by this government, as a matter of international obligation, under the law of nations, and under the treaty between this country and Mexico, of Guadalupe Hidalgo; the act of March 3, 1851, was passd to fulfill that international obligation. The ascertainment and settlement of private land claims, resting upon just such grants, was committed by that act to the judicial tribunals of this country, with power to determine the validity of the claim, finally and conclusively, between the claimant and the United States; and in sequence, to the political department of the government to fix the correct location of the grant, "so as to embrace the premises as they are surveyed and described" (Beard v. Federy, 3 Wall. 478). The inquiry by these tribunals into the validity of such claims involved "an inquiry *into the authority of the officer to make the grant,* or whether he was in the exercise of the faculties of his office when it was made" (U. S. v. Fossatt, 21 How. 445, 448).

> "But, in addition to these questions upon the validity of the title, there may arise questions of *extent, quality, location, boundary* and *legal operation,* that are *equally essential* in determining the validity of the claim. In affirming a claim to land under a Spanish or Mexican

> grant to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that *ownership* and possession of land, of *definite boundaries,* rightfully attach to the grantee" (U. S. v. Fossatt, supra).

In Los Angeles Milling Co. v. Thompson, 117 Cal. 594, the authority of the Mexican Governor of California to make a grant of Mission lands was in question. This court had held, in U. S. v. Workman, 1 Wall. 745, a direct proceeding under the act of March 3, 1851, that the governor had no power to grant "Mission lands". But the grant in Milling Co. v. Thompson, although of Mission lands, had been confirmed by the Board of Land Commissioners in the direct proceeding under the Act of March 3, 1851, and that decree of confirmation became final, unreversed by any appeal to this court. The Supreme Court of California held that the decree of confirmation could not be collaterally assailed, and that *the authority of the governor* to make the grant was concluded beyond question by the decree of the Board of Land Commissioners.

> "The Board of Land Commissioners", it was said, "was authorized to adjudicate upon the validity of *every claim* for lands in California which purported to be derived from the Spanish or Mexican government. The *validity of the claim* included *the authority of the governor to make the grant,* as well as *the existence or effect of the laws of Mexico concerning the same;* and the *jurisdiction* of the Board ex-

> tended to *the determination of each of these questions as fully* as to determining whether there had been a full compliance with the forms of law in making the grant, and its judgment thereon cannot be collaterally assailed on account of any error it may have committed in reference thereto" (p. 599).

The Supreme Court of California cites the decision of this court in Beard v. Federy, 3 Wall. 478, and quotes from it as follows:

As to the decree:

> "The Board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

As to the patent:

> "By it, *the government declares* that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and *is correctly located now* so as to embrace the premises *as they are surveyed and described.* As against the government, this record, *so long as it remains unvacated,* is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent."

When Milling Co. v. Thompson came here (180 U. S. 72) it was urged, in support of the assignment of error, that the *governor* of the California *had no authority to make the grant,* and

therefore the decree of confirmation was without that authority of law, and was absolutely void, and a mere nullity (p. 76). It was said by this court that the Board of Land Commissioners was

> "a special tribunal, limited to hear a particular class of claims, but *not limited* to the questions of *law* and *fact* which *could arise* in passing on and determining the validity of any claim of the class. * * * If there should be a wrong decision, the remedy was not by a collateral attack on the judgment rendered. *The statute provided the remedy.* It allowed an appeal to the district court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. *Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished? And it was certainly the purpose of the Act of 1851, to give repose to titles.* It was enacted not only to fulfill our treaty obligations to individuals, but to settle and *define what* portion of the acquired territory was public domain. * * * The jurisdiction of the Board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction *to decide rightly or wrongly.* If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant *or by the United States* to the district court (Sec. 9). Indeed, the proceedings in the district court were really new, and further evidence could be taken (Sec. 10). Upon the confirmation of the claim by the Commissioners, or by the district or supreme court, a *patent* was to issue and to be *conclusive against the United States"* (Sec. 15). (pp. 77-8).

The language of this court in Thompson v. Milling Co., just quoted, is repeated with approval in Barker v. Harvey, 181 U. S. 72, 77. This latter case deals with the term "servitudes" (servidumbres), to which a passing reference is made in the government's brief, and which is covered by our brief in No. 525, pp. 43-8.

The law of Mexican grants including tidelands, in California, came before Mr. Justice Field, then Chief Justice of the Supreme Court of California, at an early day, in Teschemacher v. Thompson, 18 Cal. 11 (April Term, 1861). The action was ejectment. The plaintiffs relied on a Mexican grant. The defendant set up the title of the State of California. The land in question "was, *at the date of the admission of California as a State into the Union,* below the ordinary high water mark of the Bay of San Francisco; in other words, was covered by the flow of the ordinary or neap tides of the bay" (p. 22).

> "Upon that assumption", says Mr. Justice Field, "the land thus occupied belonged at that date to the State—unless it had been the subject of *a previous grant by the Mexican government,* which the United States, *upon the acquisition of the country,* were bound to protect, *and which they have since recognized and confirmed.* Until the acquisition of the country, the land was, of course, under the jurisdiction, control and disposition of the former government; and the rights acquired by the United States were in subordination to the action of that government, so far as such action was entitled to consideration either from the law of

> nations, or the stipulations of the treaty of cession. In that respect, *the land under the tide-waters of the Bay,* between low and high water mark, *stood in no different position from that of any other land over which the former government possessed the power of disposition*" (p. 22).

Again:

> "When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations, those rights in the language of the Supreme Court, were 'sacred and inviolable'. And the obligation passed to the new government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new government, and to be executed by proper legislative action when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals, or by existing legislation" (p. 23).

And further, as to the patent, in memorable language, embodied afterwards in the opinions of this court, Mr. Justice Field goes on to say:

> "As the last Act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the *title* of the claimant existing *at the date of the cession.* By it, the sovereign power, which alone could determine the matter, declares that the previous grant was genuine: that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and

that the grant was located, or might have been located, by the former government, and *is correctly located by the new government* so as to embrace the premises *as they are surveyed and described.* Whilst this declaration *remains of record,* the *government itself cannot question its verity,* nor can parties claiming through the government by title subsequent" (pp. 25-6).

Mr. Justice Field adds:

"The patent, it is true, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the Board of Land Commissioners. But, *as the record of the government of the existence and validity of the grant,* it establishes *the title* of the patentee *from the date of the grant*" (p. 26).

"The United States," Mr. Justice Field continues, "upon the cession of the country, took the premises charged with the equitable claim of the Mexican grantees, and have since perfected the claims into a perfect title. But for such equitable claim the United States would have held the title in trust for the new State; but, *the claim existing,* the *State* and all other parties must hold *in subordination to* the action of the government respecting it. The right and power of the government to protect and thus perfect the equitable claim *were superior,* as we have shown, to any *subsequently acquired* rights or claims *of the State* or of individuals. *Immediately* upon the cession of the country, the government could have complied with its obligations, and at once have perfected the claim. Subsequent events not originating with the grantees can have no effect upon the validity of their claim, or the duty of the government respecting it" (pp. 27-8).

In concluding the opinion, Mr. Justice Field notices the case of Goodtitle v. Kibbe, 9 How., 471, which is mentioned in the government's brief. The grant in that case was a Spanish grant. It was made after the treaty of St. Ildefonso, by the terms and effect of which treaty Spain was deprived of the power to make grants of land in Louisiana. The grant was simply and merely void, a nullity, and of no effect to qualify the title in lands below high water mark, which accrued to the State of Alabama on its admission into the Union.

> "And hence," Mr. Justice Field observes, "the court very properly remarks in Goodtitle v. Kibbe that the existence of the imperfect and inoperative Spanish grant, which the plaintiffs in that case produced, could not enlarge the power of the United States over the place in question, *after* Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it *had* become vested in the State—in other words, that the existence of a previous *void* grant did not enlarge the power of the general government over the premises, and its confirmation by that government, *subsequent* to the admission of Alabama, did not impair her rights. The distinction between that case and the one at bar is too obvious to require comment" (pp. 28-9).

Knight v. U. S. Land Assn., 142 U. S. 161, turned on the title to lands under the navigable tidal waters of Mission Bay, as it is often called, or Mission Creek, an arm of the great Bay of San Francisco. It was a contest between title derived from the City and County of San Francisco, as the successor of

the Mexican pueblo, and title derived from the State of California and attributed to its dominion over tidelands, in its status of a sovereign State. The pueblo title had been submitted to the Board of Land Commissioners, under the Act of March 3, 1851; for there was no difference, in this respect, between pueblos and individuals. The pueblo title was confirmed; the pueblo grant was surveyed and patented.

Prior to patent to the pueblo, the pueblo claim had been surveyed in fulfillment of the international obligation of the government, as a final and conclusive step to determine that it "is correctly located so as to embrace the premises as they are surveyed and described" (Beard v. Federy, supra). This original survey followed the line of high water mark of the bay, as a boundary, until it came to Mission Bay. But instead of crossing Mission Bay from headland to headland, in pursuit of the main high water mark of the bay, it turned round the first headland, and into Mission Bay, and followed the meander lines of that water up one side, across to the other side, and down that other side to the opposing and second headland, and then resumed its course along the main high water mark of San Francisco Bay. The effect of that survey, if it had been allowed to stand, was to throw the lands under the navigable waters of Mission Bay outside the surveyed boundary line of the pueblo, and to assign them to the category of State tidelands, attributable to the ownership of the sovereign State.

But the original survey was not permitted to stand. The Secretary of the Interior, in the exercise of his supervisory and ultimate authority, as the head of the Land Department, set aside the action of the Commissioner of the General Land Office in approving the survey, and ordered a new survey to be made. That second survey, instead of following the meanders of Mission Bay, crossed that water, at its mouth, from headland to headland, pursuing the main tide line of San Francisco Bay. The effect of the survey thus made was to put the land under the navigable waters of Mission Bay inside the boundary line of the pueblo grant, and to establish the title of San Francisco to those lands, as by grant from the former government, confirmed, surveyed and patented under the treaty and the Act of March 3, 1851, and overcoming any title imputed to the State, subsequently to the Treaty of Cession, and as of the date of the admission of the State into the Union on September 9, 1850.

The land in controversy was a part of the lands under the navigable and tidal waters of Mission Bay. The pueblo title, it was held here, overcame any title attributed to the State in its status as such.

The opinions of this court, in Knight v. Land Assn., are of historical interest, as having been written, one by Mr. Justice Lamar, who had himself been Secretary of the Interior, and the other by Mr. Justice Field, who had been a commanding

figure in shaping the jurisprudence of California, and indeed of the nation, as to Mexican land titles.

Mr. Justice Lamar, in the most convincing way, vindicates the authority of the Secretary of the Interior, to set aside the original survey, and to order and give finality to the second survey, upon which the patent went.

> "The Secretary of the Interior," he concludes after full consideration, "had ample power to set aside the Stratton Survey, and order a new survey by Von Leicht; and his action in such matter is unassailable in the courts in a collateral proceeding" (p. 182).

And again, in speaking of the survey as a thing of finality, like the record of a final judgment, he says:

> "It is a well-settled rule of law that the *power* to make and correct *surveys* of the public lands belongs *exclusively to the political department* of the government, and that the *action* of that Department, within the scope of its authority, *is unassailable in the courts except by a direct proceeding*" (p. 182).

He now takes up the contention that "the land in dispute never was a portion of the pueblo of San Francisco, because, at the date of the Conquest, it was below the ordinary high water mark of Mission Creek, and, therefore upon the admission of California into the Union in 1850, passed to the State in virtue of its sovereignty over tidelands." And speaking for the court, he says: "To this contention we can not give our assent" (p. 183).

Mr. Justice Lamar concedes freely

> "that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original States, were reserved to the several States; and that the new States, since admitted, have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former, they held it only in trust for the future States that might be erected out of such territory" (p. 183).

"*But,*" says Mr. Justice Lamar, "*this doctrine does not apply to lands that had been previously granted to other parties by the former government,* or subjected to trusts which would require their disposition in some other way. *San Francisco v. LeRoy,* 138 U. S. 656. For it is equally well settled, that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, 9 Stat., 922, they were bound, under the 8th Article of that Treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty." And he cites Teschemacher v. Thompson, 18 Cal. 11, and Beard v. Federy, 3 Wall., 478, to which we have already made reference. And he adds: "Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same" (pp. 183-4).

He summarizes:

> "If we have succeeded in showing that the tract in dispute was part of the land claimed by the City of San Francisco as successor of

> the Mexican Pueblo of that name; that it is within the four square leagues described in the decree of the United States Circuit Court for the District of California, entered May 18, 1865; that *that court* decided and *decreed* that the *claim of title* was *valid under the laws of Mexico;* that the *official survey* of the United States officers is correct, and followed the decree of confirmation; and that the *patent* of the government of the United States, following the survey and decree, embraced *within its calls* the property in dispute;—we think it clearly follows that the *patent* of the government is evidence of the *title* of the city *under Mexican laws,* and is *conclusive,* not only as *against the government* and against all parties claiming under it by titles subsequently acquired, but also as against *all parties,* except those who have a full and complete title acquired *from Mexico anterior in date* to that confirmed by the decree of confirmation" (p. 184).

Mr. Justice Lamar cites San Francisco v. LeRoy, 138 U. S. 656, 670, 672 as being in point and as holding: "that even if there were any tidelands *within* the Pueblo, *the power and duty of the United States* under the treaty, to protect the claims of the City of San Francisco as successor to the Pueblo, *were superior to any subsequently acquired rights of California over the tidelands*" (p. 185).

He quotes the language of San Francisco v. LeRoy, as to the ineffectiveness of the deed from the State Tideland Commissioners:

> "For the State did not, at that time, own any tide or marsh lands *within the limits* of the Pueblo, *as finally established by the Land Department*" (p. 185).

And also the language of that case as to lands in California, under tide waters, acquired from Mexico, and as to the doctrine that such lands "were held in trust for the future State",—"that doctrine cannot apply to such lands as had been previously granted to other parties by the former government" (p. 186). And this further language, important in its bearing upon the recognition of the Mexican title, as antedating the admission of California into the Union, and going back to the date of the acquisition of the country:

> "The property rights of Pueblos, *equally with those of individuals,* were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. The *duty* of the government, and its *power,* in the execution of its treaty obligations to protect the claims of *all* persons, *natural* and *artificial,*—and, of course, of the City of San Francisco as successor to the Pueblo,—*were superior* to *any subsequently acquired rights or claims of the State of California,* or of individuals. The confirmation of the claim of the city necessarily took effect *upon its title as it existed upon the acquisition of the country*" (pp. 185-6).

Mr. Justice Lamar also quotes and adopts the language of Beard v. Federy, supra, in which, as in San Francisco v. LeRoy, supra, the opinion of this court was delivered by Mr. Justice Field:

> "The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the Act of March 3, 1851, they have

declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court; *and designated officers to survey and measure off the land,* when the validity of the claims is finally determined. When informed by the action of its tribunal, and officers that a claim asserted is valid and entitled to recognition, the government acts, and *issues its patent* to the claimant. This instrument is, therefore, *record evidence* of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and is correctly located now,* so as to embrace the premises *as they are surveyed and described.* As *against the government,* this record, *so long as it remains unvacated,* is conclusive" (p. 188).

Mr. Justice Field had borne a striking part in the development of the law of Mexican grants in California—*quorum pars magna fui*—and he opens his opinion with a personal reference.

"As a correct solution of the questions involved is of vital importance to the security of titles claimed under confirmed Mexican grants in California, followed by *a survey made and a patent issued* under the Land Department of the government, and as I have had personal knowledge of all legal proceedings touching the

> claim of the Pueblo of San Francisco from their commencement, I will venture to make some observations, in addition to those of my brethren, upon the propositions of law advanced by the court below" (pp. 189-190).

Mr. Justice Field gives the history of the confirmation of the city's title by a decree which he himself had made; and of the first and rejected survey, and of the second and final survey which accompanied the patent as a part thereof. He concurs with Mr. Justice Lamar in upholding the authority and last word of the Secretary, as to the finality of the survey, and remarks that, "in this respect, nothing can be added to the force of the statement in the opinion of the majority". He refers "to the frightful unsettlement of titles", and "to the infinite disturbance of the peace of the people", affecting millions of acres of land, if a survey corrected and finally passed by the Secretary of the Interior, could be open to attack (p. 200).

> "The title under the patent", he says, "necessarily antedated *any possible claim of the State of California* to the lands within the limits of the Pueblo. *It went back to the acquisition of this country from Mexico*" (p. 200). (And see Cariño v. Insular Government, 212 U. S., pp. 459-460.)

As to the treaty of Guadalupe Hidalgo, and the international obligation of the United States,

> "Pueblos," he says, "in that respect stood in the same position *as private individuals.* All their rights of property, legal or equitable,

were alike entitled to protection. *Whatever property was ceded to the United States from Mexico,* whether marsh lands or tide lands, passed *subject to the obligation* to protect existing claims to them *of all parties. The State* could take no greater interest than the United States acquired; all lands she received went under her control *charged with the equitable claims of others,* which the United States were bound by the treaty and the law of nations to protect. The marsh lands granted to her by the Act of Congress of September 28, 1850, were thus affected. *And the same was true of the tidelands.* Whatever lands *of that nature* passed to the United States were held for the future State, *subject,* however, to any trust *from the former government,* which might require their disposition in some other way. The duty and power of the United States, in the execution of their treaty obligations to protect the property claims of all persons, natural or artificial, were superior to any subsequently acquired interest of the state or of individuals. *Mexico owned the tidelands as well as the uplands;* and it was, *of course,* in *her power* to make such disposition of them in the establishment and organization of her pueblos as she may have judged expedient. And whether she *did make* such disposition *by her laws,* was a matter *exclusively for the United States* to ascertain and determine" (pp. 201-2).

As to the effect of the patent, with its associated survey, Mr. Justice Field repeats and italicises his own language in Beard v. Federy, supra:

> "By it, the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former

> government, *and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, so long as it remains unvacated, it is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent*" (Italics by Mr. Justice Field; p. 202).

Again, it is said by Mr. Justice Field that the patent

> "must be taken as correct *until vacated*, not only as to the *validity* of the claim confirmed, *but as to the boundaries established.* It is hardly necessary to say that any attempt to overthrow these conclusions in *either* particular, where the *tribunal affirming the validity* of the claim, and *the department establishing the boundaries,* had jurisdiction, is collaterally attacking the patent" (p. 205).

He continues:

> "That the Land Commissioners and the Circuit Court of the United States had jurisdiction to hear and determine the *validity* of the claims asserted by the City of San Francisco, is not open to question. The *laws* of the United States gave them such jurisdiction, and, when that claim was confirmed, *the law* directed *by what officers* its *boundaries* should be *established and surveyed.* It was the *exclusive province* of those officers to *ascertain* where *the line of true boundary ran,* subject to the control and supervision of the *Interior Department.* To say that those who directed and supervised the survey had not jurisdiction to perform that duty is to deny efficacy to the laws of Congress" (p. 205).

Again:

> "If there was error *in the survey embodied in the patent* it could not have been shown in

this action. It could only have been corrected by *direct* proceedings *for that purpose* instituted by the government or by its authority" (p. 206).

And further:

"The statement in the opinion of the court (referring to the Supreme Court of California) as to the requirement that the Surveyor General, in making the survey of a confirmed claim, should follow the boundaries of the decree as near as practicable, is undoubtedly correct, and it was the duty in this case of the surveying officers of the Land Department, under the supervision of the Secretary of the Interior, to ascertain what those boundaries were, and to follow the decree in making the survey. That they accomplished this is *conclusively established,* so far as the present action is concerned, *by the official survey itself,* returned by them and subsequently approved by the Commission of the Land Office" (p. 209).

Some authorities are referred to in the government's brief on the point that want of authority of the Department to issue a patent may be shown by extrinsic evidence, and it is said that "the cases are reviewed in Knight v. Land Assn., supra, where Doolan v. Carr was approved." The cases were reviewed in Knight v. Land Assn. by Mr. Justice Field, who cites, among others, Doolan v. Carr, 125 U. S., 618, and goes on to remark of these cases:

"They assert no new doctrine, but law which has always existed and been recognized, *though seldom more misapplied than here.* That the United States cannot convey by patent what it never owned or has already parted with, no

matter with what formality the instrument is issued, is a self-evident proposition. The government in that respect is under the same limitations as an individual" (p. 212).

But Mr. Justice Field says something further:

"The court (referring to the California court —in this respect not unlike the government's brief) failed to distinguish between what was, upon its own statement, *mere error* in the action of the Land Department, and matters which were entirely beyond its jurisdiction. The *ascertainment of the true line* of the *boundaries* of the claim confirmed *was a matter especially entrusted to that department by the laws of Congress,* as already stated. If the officers of that department, in executing the survey, made mistakes, ran erroneous lines, and *included* lands which they should have *excluded,* those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void. If all that is asserted be true, they only *erred* in the *exercise* of their jurisdiction, and the remedy for their errors, *before* the issue of the patent, lay in an appeal to higher officers of the department—from the surveyor general to the commissioner, and from his decision to the secretary of the interior;—and if, *after* the issue of the patent, like objections were urged, the remedy could be sought *only by direct proceedings*" (p. 212).

And further, says Mr. Justice Field:

"The distinction between errors committed where jurisdiction exists to take the proceeding in which the alleged error arises, and where there is an entire want of jurisdiction over the subject matter considered,—is too familiar to be discussed. The distinction is constantly ap-

> plied with reference to the proceedings of ordinary tribunals. If they had jurisdiction of the subject-matter and the parties, their judgment cannot be collaterally assailed for mere errors committed in the proceedings leading to it. The remedy for errors must be sought by application for a new trial, or by appeal for a review to an appellate court. The *same distinction* prevails with reference to the proceedings of the *special tribunal or department* of the government, *to which is entrusted the supervision of measures for the issue of its patent*" (p. 212).

And finally, it is stated by Mr. Justice Field as the true doctrine, settled

> "by a long line of previous adjudications," that, "upon a confirmation of a Mexican grant, the *patent* issued by the United States to the claimant is the *only evidence* of the *extent* of the grant, and that, *if there is a conflict* as to its *location and extent, between it and the decree of confirmation, the patent must control*. It is the only doctrine which will insure peace and tranquility to parties holding under patent issued under confirmed Mexican grants, any other doctrine would introduce endless confusion and perplexity as to all such titles. If there be, in fact, any material conflict between the *boundaries* given in the *decree of confirmation* and those described *in the official survey*, the *only remedy* is to be sought by *direct proceeding* instituted by the government, or by its authority. Until the alleged conflict is thus determined and adjusted, the *patent must control*" (p. 215).

In the case of Shively v. Bowlby, 152 U. S. 1, it was held, after a painstaking examination by Mr. Justice Gray, that the title and rights of *riparian*

or *littoral* proprietors in the soil below high water mark, are governed by the local laws of the several States (152 U. S., pp. 26, 40). It was further held in that case that the new States, admitted since the adoption of the Constitution, "have the same rights as the original States in the tidewaters and in the lands below the high water mark, within their respective jurisdictions" (p. 26). This is a general principle, not a mere deduction from the terms of a deed of cession, like that from the State of Georgia to the United States; and the general doctrine, as to the rights of the new States, has been constantly applied to California, which was acquired from a foreign country, Mexico, by the treaty of Guadalupe Hidalgo (p. 28). Hence it is, that a Mexican grant of land, not in the Bay of San Francisco, but bounded "by the bay", did not include land below ordinary high water mark. As the court said in Shively v. Bowlby (p. 29), quoting the language of Mr. Justice Field in U. S. v. Pacheco, 2 Wall., 590: "When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails." The Pacheco case was a direct proceeding under the Act of March 3, 1851. Shively v. Bowlby is excerpted by the government's brief, for this reference to the Pacheco case; as if it could have any pertinency to a case controlled by an official survey and patent, which carries the boundary below and beyond the high water mark, and out to the *Anchorage of Ships*, as precisely de-

fined *by the line of the survey.* The government's brief should not have stopped short with this limited excerpt from Shively v. Bowlby. That case does contain statements which have a real pertinency to the case at bar. To begin with:

Shively v. Bowlby (p. 30) cites Knight v. Land Assn., supra, for the general principle that the new States have the same rights in the tidewaters within their respective jurisdictions as the original States; and that, upon the acquisition of the territory from Mexico, the United States, with respect to the tide lands, in distinction from the upland, held the former in trust for the future States. Now, then, the opinion in Shively v. Bowlby at once proceeds to say:

> "In that case (referring to Knight v. Land Assn.) it was further held, as it had previously been declared in San Francisco v. LeRoy, above cited, that 'this doctrine does not apply to lands *that had been previously granted* to other parties *by the former government,* or subjected to trusts which would require their disposition in some other way'; and that, when the United States acquired California from Mexico by the treaty, they were bound by its stipulations, and by the principles of international law, to protect all rights of property acquired *under previous lawful grants* from the Mexican government. And it was therefore adjudged that under a boundary 'by the bay', in the Mexican grant of the Pueblo of San Francisco, duly confirmed by a decree of a court of the United States, and *defined by a survey* under the authority of the Secretary of the Interior, as following the general line of high water mark of the bay, crossing the

mouth of *a tidewater creek*, the *title* of lands inside of that line, although *below high water mark of the creek*, was *included*, and therefore did not pass by a deed from the *State*" (pp. 30-31).

Again, in Shively v. Bowlby (p. 47), it is said:

"Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any lands below high water mark, of navigable waters in a territory of the United States, it is evident that this is not strictly true.

"Chief Justice Taney, in delivering an opinion already cited, after the subject had been much considered in the cases from Alabama, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, *before* Alabama became a State.' Goodtitle v. Kibbe, 9 How., 471, 478. In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands *below high water mark*, was treated as depending *on the terms of the decree of confirmation* by a court of the United States *under authority of Congress*. By the application of that test no such lands were held to be included in U. S. v. Pacheco, 2 Wall., 587, and *some such lands* were held to be included, in Knight v. U. S. Land Assn., 142 U. S., 161."

"We cannot doubt, therefore," says Mr. Justice Gray in the Shively case, "that Congress has the power to make grants of land *below high water mark*, of navigable waters in any territory of the United States, whenever it becomes necessary to do so *in order to perform international obligations*, or to effect the im-

> provement of such land for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory" (p. 48).

It has not been, he says, a general policy of Congress to dispose of these lands, meaning tidelands. The policy of the United States is, that such lands, having a value for commerce, navigation and fishery, "shall not be granted away during the period of territorial government, but, unless *in case of some international duty* or public exigency, shall be held by the United States in trust for the future States" (pp. 49-50, 58).

Los Angeles v. Farming & Milling Co., 152 Cal., 645; 217 U. S., 217, cited in the government's brief, is reviewed in our brief in No. 525, pp. 48-51. The question was between two riparian proprietors, as to their relative rights in the water of the Los Angeles river. No federal question, no issue of law, under the Constitution, Statutes, and Treaties of the United States, was presented. Both parties rested on titles derived respectively from Spanish and Mexican authority, duly confirmed and patented under the Act of March 3, 1851, and those titles, as for their delimitation, took both parties down to the bank of the Los Angeles river. To what extent the two proprietors, as riparians, had rights in the waters of the stream, and, as between themselves, who had the paramount right—this was not a federal question, it was a question of the

local law, depending upon the comparative rights of an individual and a pueblo, both riparians, to the water as it flowed. The local law, the law of Spain and Mexico, put the community or pueblo, justly enough, ahead of the individual. That was the case, and that was why this court declined jurisdiction.

Boquillas Cattle Co. v. Curtis, 232 U. S. 342, cited in the government's brief, is also reviewed in our brief in No. 525, pp. 51-3. Like the Los Angeles case, it was a controversy over the use of running water, determinable by the law of the locality, and arising between a riparian proprietor and an appropriator. The local law made for the appropriator. The grant and patent carried the riparian proprietor down to the bank of the stream, but did not "create" or originate the title,—that went, for its source, to the Mexican law. Standing on the river bank, what rights the patentee had in the water flowing at his feet, did not present any federal question. The Act of Congress, with its decree and patent, did not purport either to create or to enlarge the grant. It confirmed the grant, and ascertained the boundary at the river bank, leaving the question of supervening water rights to the standards of the local jurisdiction.

It is now submitted: The western boundary of "the whole of North Island" is precisely and conclusively defined to include the tideland area, by the United States patent and the official survey embodied therein. The State of California never

had title to these particular tidelands. Such lands, by elder and patented title, passed in fee simple absolute to the Mexican grantee, or his successors in interest, pursuant to the confirmation of the Mexican grant.

III.

THE PUBLIC RIGHT OF NAVIGATION AND FISHERY, AND THE PUBLIC REGULATION OF THE SAME, ARE NOT IN QUESTION HERE.

As a second and formal proposition, to be argued, it is stated in the government's brief:

> "At most, defendant company's right, title or interest, if any, in the lands below high water mark, are subject to the paramount servitudes and powers of the federal and state government to protect navigation, commerce and fishery."

It is difficult to understand why such a proposition should be selected as a topic for discussion. Nobody here is questioning the public right of regulation, and the paramount nature of the federal right. The thing is mere *brutum fulmen.*

It is said in the government's brief, that the jury were told that private ownership and use of the lands below high water mark "was subject *only* to *existing* federal regulation as to harbor lines"—"*only* to *existing* regulations of bulkhead and pierhead lines *as now* fixed by the United States government". And again, the remarkable statement is made, that by an instruction, the jury were told

that our private ownership, derived from the Mexican government, "freed these lands from any regulation by California designed to protect the navigable capacity of her harbor entrance, and from any future regulations by the federal government that might be necessary to protect the rights of navigation or the military posts across the bay". This is a revealing instance, if not of exaggeration, at least of misconception. Nothing of that kind happened.

The instruction in question deals with two specific points: (1) the private ownership of this defendant, as derived from the former government of the country in distinction from the State of California, and as extended by the United States patent to the Anchorage of Ships, precisely defined by the official survey; (2) the right of this company as an owner to construct wharves, and improvements of that kind, on its submerged lands, subject to reasonable public regulation. The United States Government had fixed a bulkhead line. This defendant, the jury were told, must conform its improvements thereto. No question of the power of either government, federal or state, to change existing harbor lines, was raised or mooted. This is the instruction (Tr. p. 105):

> "The land in question whose value you are to fix, and which has been described in the Act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the

line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the Anchorage of Ships; and the line of that anchorage is precisely defined by the United States Survey accompanying the patent, and which has been delineated before you upon the maps in question.

"Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation; and in this respect I instruct you, that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed, as it has been, beyond which a solid fill is not permissible without consent of the government, and that it is likewise a reasonable public regulation that the pierhead line be fixed, as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company, that it may construct wharves, docks, piers, warehouses, terminals or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements, the Coronado Beach Company would be exercising the right to use its privately owned tidelands.

"And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same was derived from the former government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the government by the survey and patent."

That is the instruction. *Res ipsa loquitur.* No question can be made as to its correctness in the matter of title, patent, and survey. And if this defendant had title to those tidelands, it was entitled to improve them with appropriate structures, subject to public regulation. If its status had been that of a mere riparian or littoral proprietor, it would remain that, in most jurisdictions, by local law, and certainly in the State of California, its rights would include access to navigability and "the right to make a landing, wharf or pier for its own use, or for the use of the public, subject to such general rules and regulations as the legislature may deem proper to impose for the protection of the rights of the public, whatever those may be" (Yates v. Milwaukee, 10 Wall. 497, 504; Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 262; Savings Union v. Petroleum Co., 144 Cal. 134, 137). But this company was more than a riparian or littoral proprietor. It owned the fee, subject to public regulation.

More than that, no question as to the right of public regulation, federal or state, was mooted at the trial, or involved in the exception to the instruction, taken below. The trial court, after completing its instructions to the jury, inquired:

> "The COURT. Are there any exceptions, gentlemen, to the charge to the jury?
>
> "Mr. DENIS. The government has none, excepting the refusal of the court to charge as requested by the government in the last instruction, in regard to tidelands (this is the instruction to the effect that the State is the

owner 'of all land' within the State below high water mark, and that private ownership 'in this State' can only extend to the high water mark: Tr. p. 105, ad. fin.). And then the government also desires to except to the instruction with reference to the *title* to the *submerged lands*. With these exceptions, I know of *no other* instruction.

"The COURT. You *particularly* refer to the instruction *that the patent extends out to the anchorage?* Including 663 acres?

"Mr. DENIS. The whole of *that* instruction, *yes*, your Honor—those are the *only* two.

"Mr. DUNNE. And, if your Honor please, the only exception we care to reserve is an exception to the returning of anything other than a general verdict. I really do not think the case requires it, and I think I would like to save the point" (Tr. pp. 104, 105).

The "precise point", then, to which counsel called the attention of the court ,and to which counsel "particularly" referred, was the instruction "that the patent extends out to the anchorage"; the precise point was "with reference to the *title* to the *submerged lands*". No question of public regulation was suggested by counsel, no correction or amplification on that head was proposed, no further instruction was asked.

"One object of an exception is to call the attention of the Circuit Judge to the *precise point* as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so" (Beaver v. Taylor, 93 U. S. 46, 55).

"A party must make every reasonable effort to secure from the trial court correct rulings,

> or such at least as are satisfactory to him, before he will be permitted to ask any review by the appellate tribunal; and to that end he must be *distinct* and *specific* in his *objections* and *exceptions.* Rule 4 of this court provides: 'The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court. Repeated decisions have emphasized the necessity of a strict adherence to this rule: 'However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be *specifically* called to the *precise point* to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception'. Harvey v. Tyler, 2 Wall. 328, 339. 'If it was intended to save an exception as to *distinct propositions* embodied in the instructions, the attention of the court should have been directed to the *specific points* concerning which it was supposed error had been committed'. Moulor v. Ins. Co., 111 U. S. 335, 337." (Allis v. U. S., 155 U. S. 117, 122.)

And in R. Co. v. Skaggs, 240 U. S. 66, 72, this court commends:—

> "the salutary rule that a party is not entitled to sit silent until after the verdict, and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called."

IV.

THE APPRAISEMENT, UNDER THE ACT OF JULY 27, 1917, c. 42, 40 STAT. 247, IS OF THE WHOLE OF NORTH ISLAND, NOT SOME PART; AND THE WHOLE OF NORTH ISLAND, FOR THE PURPOSES OF THE APPRAISEMENT, IS MEASURED BY "ANY RIGHTS PRIVATE PARTIES MAY HAVE IN THE SAID ISLAND OVER AND BEYOND ANY RIGHTS THERETO IN THE UNITED STATES".

If the terms of the statute were ambiguous or uncertain, as they are not,

> "it is a well settled principle of law that if the terms of a deed are ambiguous or uncertain in describing the land conveyed, the courts will look back to prior deeds in the chain of title, to secure the true description of the land" (Davis v. Seybold, Circuit Court of Appeals, 195 Fed. 402, 412; U. S. v. McMasters, 4 Wall., p. 681; Cragin v. Powell, 128 U. S., p. 696).

This plaintiff, the United States, by a conclusive and unvacated record—by the patent and the survey, has located and defined this land, and has fixed its western boundary. And when the United States authorized, by this statute, "the *appraisement* of *any rights private parties* may have in the *said* island (whole of North Island) over and beyond *any rights* thereto in the United States", it knew, by its own record, the source, character, extent and definition of the rights of this defendant; and those rights—"any rights"—of this private owner, —it was, that the statute seeks to appraise. Such rights included as well the tideland as the upland. And it is further said in this same statute: "Upon the final ascertainment of the *value* of *any right, title* or *interest adjudged* to be in any private

claimants to the said island, there shall be paid into court the *value* of the *same,* as so determined."

The "appraisement", therefore, is to be "of any rights" we have in "the whole of North Island", over and above "any rights" thereto in the United States. The "value", as to which a "final ascertainment" is to be had, is the value "of any right, title or interest adjudged" to be in us to the said island. And the "value" which "shall be paid into court" is the value of the "same"—that is, "of any right, title or interest" adjudged to be in us. Our "right, title and interest" is conclusively established and defined by the patent and survey. What was the value, what shall be the appraisement, of that "right, title and interest"? That was the question which the jury answered by their general verdict.

> "The only proper way to construe a legislative act is from the language used in the act" (U. S. v. Freight Assn., 166 U. S. 290, 318.)

The language used in the Act of July 27, 1917, is forthright and plain. It relates to "the whole of North Island"; and it calls for the appraisement and value "of any right, title or interest" in said island, of private parties. The rights and titles of the individual, whatever they may be—*any* right, title or interest—was to be appraised and valued, the value "of the same" was to be paid, and the individual to be eliminated. "It has never been the policy of the United States", said Mr. Justice Field, "to possess interests in land in connection

with individuals" (Moore v. Smaw, 17 Cal. 201, 226).

Doubtless, "upon occasion", when the need arises from the inadequateness of language, a court may resort to the history of the times when a statute was passed, and "under proper qualifications", to the Committee Reports, including the bill as introduced and changes made in the course of its passage (U. S. v. Freight Assn., 166 U. S., p. 318; U. S. v. Ry. Co., 247 U. S. 310, 318). This, of course, does not "relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment" (U. S. v. Ry. Co., supra). But while the reports of a committee of the Senate or House "may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different" (Penn. R. Co. v. International Coal Co., 230 U. S. 184, 199).

If, now, we leave the plain language of the statute itself, and turn to the House and Senate Committee Reports, what then?

The House Report (Vol. 1, 65th Cong., 1st sess.) consists of a simple recommendation, referring to "the whole of North Island", and the submission of a letter from the Secretary of War, to which we have already made a reference.

(a) The recommendation:

"The committee on military affairs, to whom was referred the bill (H. R. 4892) authorizing the president to take possession, on behalf of the United States, for use as sites for permanent aviation stations for the *army* and *navy*, and for aviation school purposes, of *the whole of North Island*, in the harbor of San Diego, Cal., and for other purposes,—having considered the same, report thereon with a recommendation that it do pass; and submit the following letter from the Secretary of War in support thereof."

(b) The letter of May 17, 1917, from the Secretary of War:

This letter informs the House Committee that the question in hand has received consideration "by a *joint* board of *army* and *navy* officers". The report of this board is quoted:

"The board is of the opinion that North Island, San Diego, Cal., is *the best location in the country* for the establishment of a *joint army* and *navy* aviation station for the primary training of pilots. The question of the *legal ownership* of North Island, and also the high price requested of the government *by its claimants*, have prevented for a period of several years the final determination of a site for a government aviation training station in Southern California. The board recommends that the authority of Congress be obtained for immediately taking possession of North Island, San Diego, Cal., for the *joint uses* of the *army* and *navy* air services."

The letter submits

"a draft of an act for authorizing the president to take possession of North Island for the

> aviation needs of the *army* and *navy*, giving the *claimants* to said island the right to proceed in the courts for the determination and *appraisement* of *any rights* they may have in the said island over and beyond *the rights* of the United States thereto."

And it is explained that the act has been so drawn

> "in view of the fact that the *title* of the claimants to North Island rests *on the confirmation of a Mexican grant.*"

More than that, the added information in respect to this title is communicated, of

> "the issue of a *patent* based on the *confirmation of the Mexican grant.*"

It is finally said:

> "The question is not free from doubt, and it is the view of this Department that the legislation should provide, as in the draft submitted, for the determination of the *respective rights* of the claimants and the government to these lands, and for the payment to the claimants of the *appraised value of any rights they may have* in said island over and beyond *the rights* of the United States in the premises. It is accordingly recommended *that the legislation take this form*, and that authority be granted as promptly as possible."

It is entirely clear, from this House Report, that Congress was well aware of the source, extent, character, and definition of the rights of this defendant —that its rights rested upon the confirmation of a Mexican grant, and the United States patent based on such confirmation. And it is just as clear that

the appraisement intended and, in so many words, expressed by Congress, was the appraisement "of any rights" this defendant may have in North Island over and above any alleged rights of the United States.

The Senate Report, in substance, almost in very words, is a duplicate of the House Report (Cong. Rec., Vol. 55, pt. 5, p. 5100).

It would seem that further extrinsic reference, in aid of the construction of a plain statute, is unnecessary. But we are referred, in the government's brief, to the declarations of some army and navy officers, as a guide to the interpretation of the Act of Congress. These declarations are to be found in a report of the Commission on Navy Yards and Naval Stations (House Doc., Vol. 32, Doc. 1946, pt. 3). If these declarations show anything, they put it beyond doubting that it was never the intent of Congress, in contemplating the use of North Island, as well for the navy as for the army—as well for water flying as for land flying—to leave in strange hands the tideland area of 663 acres, included in and defined by the patent, and required for and adaptable to the manoeuvering of the water-planes —hydroplanes—of the navy.

We are first referred to page 15 of House Document No. 46. Captain Cunningham, of the marines, is named as an authority on five proposed aviation sites on San Diego Bay, and in addition, one on Mission Bay. Site No. 4 has been sold, it is no longer available. Site No. 5 is to be acquired "for

advance base purposes". Site No. 2 is Coronado Heights, on San Diego Bay, and of this site, it is remarked significantly:

> "The purchase of Site No. 2, Coronado Heights, for the *army* aviation school is under consideration, and an appropriation for the purchase of such a site has been made; but in any event, *the water* in the vicinity of this site, *is too shallow for the use of naval hydroplanes*".

Site No. 3, on the east side of the bay, near its lower end, he says, "has the disadvantage of *insufficient depth of water* in its vicinity".

> "Site No. 6 is on Mission Bay, *which is too shoal for use by hydroplanes.* Mission Bay is also *cut off from the sea by a low-highway trestle.* These disadvantages *eliminate it from consideration.*"
>
> "This leaves available for consideration only Site No. 1, North Island, which contains about 1200 acres of *level* ground (so it does contain this mesa land, and an additional acreage of high ground, the meadow and marsh lands, over 200 acres, and also the tidelands), all *well above* high water, *and fronts both the bay and ocean.* Adjoining this property *on the east* is a tract of several hundred acres of shallow submerged land, known as Spanish Bight (an arm and indentation of San Diego Bay), which could be reclaimed if necessary to form an *enlargement* of North Island. The Commission of Army Officers hereinbefore referred to, reported that 'North Island is the best possible site for the location of an aviation school'."

We are not, it seems, without medical authority. At page 16 of this House Document, the fleet surgeon speaks of the "splendid isolation" (the expres-

sion is ours, not the doctor's) of North Island, "*surrounded by deep water,* and *isolated* from contaminating influences and nuisances, while yet accessible to the city conveniences". As to Coronado Heights, the doctor disapproves of "its location on *shallow water.* So, Chulavista, while good enough in a sanitary point of view, "is located on *very shallow water*". And Mission Bay is objectionable in its "remote location *on shallow water*".

At pages 28 and 29 of this House Document, we have the report of Captain Cunningham, of the Marines, mentioned in the government's brief. Of Site No. 1, North Island, the Captain says:

> "This site *contains* 1200 acres of high land, clear of all obstructions, *fairly level.*".

This is the mesa land which North Island contains, as it also contains the 200 acres of meadow land and marsh land, also above high water mark, and the tidelands to the line of the official survey. The Captain has something more to say of North Island:

> "It has *protected clear water,* of the *proper depth,* on *three sides,* and the ocean on the other side, with all the *manoeuvering* and flying space desired *on three sides.*"

He says further:

> "It has *a sloping beach, on which runways can be easily constructed.*"

Again:

> "The *water* on *three sides,* is *sheltered* and has no surf."

Again:

"This is by far the best location for an aviation base. Instruction, test, and experimental flying could be carried on here throughout the year, under the most favorable conditions, *both on land and water.*"

Again:

"Is satisfactory for dirigible hangars, both ashore or *afloat.*"

And again:

"The average *rise and fall of the tide* at this place is four feet, and the average current in the channel is two and one-half to three miles per hour."

So much for North Island. The Captain is also "illuminating" in what he says of Site No. 2, Coronado Heights. He says:

"The greater part of the *Beach Front* is *Muddy*, but has a *gradual slope*, and *runways could be built, but not as satisfactorily as at Site No. 1.*"

"Instruction, test, and experimental flying could be carried on here throughout the year, *both on land and water.*"

"It has plenty of *protected clear water* of from one to five feet depth on one side, and the ocean on the other. Is satisfactory for dirigible hangars, *afloat or ashore*, provided the necessary *dredging* is done. It would not be satisfactory for *water flying*, unless a large amount of dredging was done. With the *present depth*, it is difficult for *small boats* to reach this site. There is a four foot *rise and fall of tide*, but practically no current, as it is situated at the head of the bay."

> "The amount of dredging necessary to make this situation suitable for *water flying* and *water communication* would probably be prohibitive. Its *main advantage* is the large amount of *level* smooth *high ground*, which would be advantageous for *land flying*, and the operation of dirigibles."

Site No. 3 (on the east side of the bay, near its lower end, page 15 of the House Document), would have to be filled in, "the entire water front", to one-fourth of the full area, and "when filled in, there will be *no beach on which to construct runways.* It has plenty of *protected clear water of the proper depth, on one side* of it.

> "It would not be suited to *land flying* on account of its size, and the railroad crossing it. It is satisfactory for dirigible hangars *afloat*, provided the proper amount of *dredging* is done. The amount of *dredging* necessary to give the proper depth for *water flying* and *water communication* would probably be prohibitive."

Site No. 4 is not available. (This site has been sold—said page 15.) As to Site No. 5: This is the site intended "for advanced base purposes" (said page 15). Says the Captain:

> "There would be *no beach on which to build runways.* It has plenty of *protected clear water* on *one side.* The air conditions are satisfactory for instruction, tests and experimental flying throughout the year, *both on water and land.* Is satisfactory for dirigible hangars *afloat or ashore.*"

Site No. 6 is Mission Bay. "The *shore line*" says Captain Cunningham, is a bluff, with an aver-

age height of from 12 to 15 feet. *A beach,* on which *to construct runways* would have to be made by grading the bluff.

> "It has plenty of *protected clear water* on *three sides* of it. * * * The greater part of the bay is not satisfactory for *water flying,* on account of its *small depth* and *absence of a channel leading to deep water.*
>
> "It is not large enough for *land dirigible sheds,* and the *shallow depth* of water will not allow *floating dirigible sheds.*"

So much for Captain Cunningham's report. We are next referred, in the government's brief, to Appendix B, Part 4, of this House Document, p. 33. This goes, it is said, on data furnished by the San Diego Chamber of Commerce. As to North Island:

> "*Topographical Features.*—A practically level area. Contains 1200 acres. (This obviously means that the table land, or mesa, in distinction from the 207.24 acres of meadow, marsh and beach land, also lying above high water mark—contains, approximately, 1200 acres; speaking exactly, it is 1232.93 acres—Transcript, p. 106.) *Fronting on both the bay and the ocean, without obstruction other than* buildings used in connection with the aviation school. Shore line, *sloping beach,* with *easy access to deep water.*
>
> "*Statement of Ownership and Title.—Owned* by Mr. John D. Spreckels. (The name of the owner is not technically accurate, but Mr. Spreckels is the President and a principal stockholder of the Coronado Beach Company.) The Coronado Beach Company has *title* under *a patent issued by the United States of America.*"

The map referred to, in this connection, by the government's brief, was not admitted in the court below. It is not correct to say that this map "shows the meander of the shore line, approximately 1200 acres of fast land". This would imply that only the mesa or table land is shown. The real fact is, that the meadow, marsh and beach land is shown as well, and is distinguishably colored. It is simply a map of the upland, showing the water facilities only generally, and without indication of the grant line, under the United States patent just referred to, defined by the official survey.

At page 41 of this House Document, part 6, of Appendix B, Colonel Glassford, of the Signal Corps, commanding the aviation school at North Island, makes the significant observation touching the "Panama Aviation Schools", that they "should be situated adjacent to a sheltered bay, *permitting both land and water instruction,* but not on the shore of the open ocean, where breakers would interfere with launching of *flying boats* and *hydro-aeroplanes.* This bay should be large enough to permit the operating of many machines at the same time without interfering with one another. It should also be away from tide *flats,* and the *surrounding water* should be deep enough to permit rescue boats *moving near the shore.* Tide *flats* make forced landings disastrous. *A river* is not suitable for *water training".*

And Colonel Glassford (said page 42) speaks of the desirability of a joint service and training, army and navy, "the navy to prepare for training in *water machines,* and the army for training in land machines". And he makes (said page 43) a pointed and instructive objection to Coronado Heights:

> "A salt industry, *using adjoining tidelands,* objectionable."

Appendix C, part 1, at page 44, of this House Document, appears to have escaped the notice of the government's brief. It deals with "the different sites for aviation bases at *San Pedro,* Cal." San Pedro is the harbor of Los Angeles. The report is made by Captain Cunningham, of whom we have already heard: The Captain is not pleased with Site No. 1, at San Pedro:

> "It has *no beach,* on which *to build runways.*"

Site No. 2 is too small. As to Site No. 3:

> "This site and the area *in front of it* are tide *flats, dry at low water.* With any reasonable amount of dredging, there would not be enough *clear water at low tide* for satisfactory *manoeuvering of high power hydroplanes.* * * * Has *no beach on which to build runways.*"

And as to Site No. 4, the Captain says the same things, in the same words, as he has just said of Site No. 3. He likens Site No. 5 to Nos. 6 and 7, and of 6 and 7, considering them as one tract, he says:

"These sites have the advantage of being *on the lee shore.* Of the two sites, No. 7 is the more suitable on account of the *wider basin* at this point. There is *not enough clear water,* and any reasonable amount of *dredging* would not give enough clear water *for manoeuvering high power hydroaeroplanes at this site.* Has *no beach* on which *to build runways.*"

Of Site No. 8 he says:

"*This site has the advantage of unlimited clear water for manoeuvering. It has a sloping beach,* which would allow *easy construction of runways.*"

Of the sites at San Pedro, Captain Cunningham, in summarizing (said page 46) rejects all but two, Nos. 1 and 8. Comparing these two survivals of the fittest, he says that:

"Site No. 1 is better protected from rough water and the annual storms; it has *sufficient clear water in front* for *manoeuvering.* The absence at this site," he goes on, "*of a sloping beach on which to build launching runways,* will make necessary the construction of landing floats with aprons, or the use of derricks for hoisting aeroplanes in and out. This site is satisfactory for floating dirigible sheds; but not good for *manoeuvering* a dirigible into its shed *ashore* on account of the hill and bluff on the land side. Site No. 8 has *a sandy beach,* which allows easy construction of runways. * * * It is not suited to dirigible sheds ashore on account of telegraph wires, etc., but *floating dirigible sheds* could be used here."

He adds, as the result of experience,

"That concrete or wooden runways, *built on a firm beach with a moderate slope,* is the

most satisfactory means of launching and handling *hydroplanes* from a shore station. Where *the beach* does not have a gradual slope, it is necessary to either construct a float hinged to the shore by a wooden runway, and with a sloping apron on the water side; or to use derricks for hoisting machines in and out. The float and apron is troublesome, and easily damaged by rough waters. The derrick method is still more troublesome."

It will not excite "special wonder" that the navy yard commission should have recommended (page 17 of said House Document) the enactment of legislation to the following effect:

> "That the Secretary of the Navy is hereby authorized to acquire by purchase, through condemnation or otherwise, for aviation purposes, *all* or *any portion* of the land on San Diego Bay, California, known as North Island."

It must be very clear that a strange ownership of the beach and tidelands, out to the line of the official survey, is not a part of the fitness of things, in respect to a joint army and navy aviation site, at such a place as North Island. Certainly, the Secretary of War was wise in recommending, and Congress was careful to enact, that the "appraisement", under the Act of July 27, 1917, should be "of *any rights private parties may have* in the said island over and beyond any rights thereto in the United States".

There only remains the colloquy between Mr. Caldwell and Mr. Mann, on the floor of the House,

referred to in the government's brief (Cong. Rec., Vol. 55, pp. 5434-5). Perhaps this colloquy may point the rule that debates in Congress are not considered important, as an aid to the judicial interpretation of the statute. At all events, we give the interchange a little more fully than does the government's brief.

Mr. Mann, noticing that the Senate Amendment struck out any limitation of expenditure "for purchasing this aviation station", inquired if an estimate had been made by the War Department "as to what it would cost".

Mr. Caldwell then took the floor to say, somewhat liberally, that

> "the War Department believes that the Island will not cost us a cent, but they do not wish to be handicapped, so that, *if a suit is brought* and afterwards for any reason *they are wrong*—
>
> "Mr. MANN (interrupting). That is the wildest kind of a foolish opinion for the War Department to express—to say that it will not cost a cent, and then to object to a limitation of half a million dollars."

Mr. Caldwell then proceeds to make a statement, inaccurate in part, and the inaccurate part of which, and only that, is quoted in the government's brief. He says:

> "The facts are these, this Island has a little over a thousand acres in it, the property has been appraised generally at about a thousand dollars an acre (this is where the government's brief stops). The *claim of title* by the

United States government to the land rests on the fact that when *the Mexican government granted the property to the original grantee,* it retained the right to reoccupy the property at any time for purposes of national defense. (This is the far-fetched easement, not in the public ungranted lands, but in lands granted to settlers in private ownership.) Following the War of 1848 with Mexico, *in the Treaty of Guadalupe Hidalgo,* the United States Government obtained all the rights of the Mexican Government in any land north of the line that they drew across from the gulf to the Pacific. Now, this particular Island has been used for aviation purposes for some years, under an agreement with the people who had possession of it.

"Mr. MANN. Is it the Island at San Diego that we have been occupying under a lease?

"Mr. CALDWELL. It is the Island we have been occupying at San Diego.

"Mr. MANN. And now they propose to deny the title of the lessors.

"Mr. CALDWELL. The claimants have notified the government to get off.

"Mr. MANN. And the government claims that after it has gone into occupation under a lease, being ordered off, it can deny the title of the lessors? (Mr. Mann might have added that the government bought from the Coronado Beach Company in 1901, some 57 acres in the southwest part of North Island, for a military reservation, without questioning the title, and paid the money for it: Tr. p. 21.)

"Mr. CALDWELL. There was no lease, they had free use of the Island.

"Mr. MANN. There was a lease under a nominal consideration, I have seen the Island."

Mr. Caldwell thinks there was no lease, but "all I know about it is what the War Department has

told me". He recurs to the government's claim of easement, but "I have not searched the title" He adds:

> "If we start to take possession of this property, and court proceedings are had, *and it is found that they have title,* while we do not think they have, and it can be settled for a few dollars more than $500,000, then we cannot keep possession, we cannot settle it, we will have to try the case through the courts. If, on the other hand, they can make settlement (not being tied down by a maximum of $500,000), *if we find that the claimants have good title,* then this permits them to settle, and that is the whole question in a nutshell.
>
> "Mr. MANN. What authority is there for anyone to bring suit against the government which illegally seizes someone's property?
>
> "Mr. CALDWELL. This does not illegally seize it.
>
> "Mr. MANN. Then legally seizes it?
>
> "Mr. WALSH. The constitution.
>
> "Mr. MANN. No, the Constitution does not give them the right to bring suit.
>
> "Mr. CALDWELL. No, but the bill does."

Mr. Green, of Iowa, having noted Mr. Caldwell's remark that there was no power in the War Department to make a compromise, went on to say:

> "I do not propose to hold this up upon that ground, but it seems to me that it would inevitably result in their paying more than the amount."

Whereupon Mr. Caldwell said:

> "The proposition is this: 'The idea of the Department is to take possession of the property. They need it for the nation's defense.

> We do not want to take anything that does not belong to us, and we do not want to pay for anything that we own. We do want possession of this Island, and we want to give these people a fair chance to go into a recognized, constituted court, and *prove their claim*, and get anything that is coming to them. We do not want *to limit them*. We want to pay *all* that it is worth, no more and no less, and *all the legal claim*, no more and no less'.

And that is the appraisement provided for by the statute—of "all the legal claim, no more and no less"; of "any rights private parties may have in the said Island, over and beyond any rights thereto in the United States".

V.

THE INSTRUCTIONS TO THE JURY "AS TO THE TITLE TO, AND CHARACTER OF OWNERSHIP OF, LANDS UNDER NAVIGABLE WATERS", WERE PROPER INSTRUCTIONS, AND NO ERROR IS PREDICABLE THEREOF.

The government's brief, as a last proposition, states that this case should be reversed and remanded:

> "Because the United States was entitled to have the 1232.92 acres of land lying above high water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon."

And in support of this proposition, it is said:

> "It is confidently submitted that the government was entitled to have this high land val-

> ued by the jury, *under its requested instruction that the State of California is the owner of all land bordering upon the tidewaters within the State, and that the private ownership of lands bordering thereon could only extend to the ordinary high water mark.*"

Certainly, if anything is clear and settled, it is that the State of California is *not* the owner of *all* land bordering upon the tidewaters within the State, and that the private ownership of (all) lands bordering thereon is not limited by the ordinary high water mark. It is not necessary to go over this ground again. We have endeavored to cover it with some fullness.

> "Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland; but with respect to the former, they held it only in trust for the future states that might be erected out of such territory. *But this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way*" (Knight v. U. S. Land Assn., 142 U. S. 161, 183, per Lamar, J.; per Field, J., 201; San Francisco v. LeRoy, 138 U. S. 656, 671; Shively v. Bowlby, 152 U. S. 1, 30, 47, 48, 50, 58; Teschemacher v. Thompson, 18 Cal. 11, 22, 27-8).

The evidence of several witnesses is quoted at some length in the government's brief, as having been admitted "to prove that the ownership of the tidelands as a unit with the uplands was a material factor in arriving at the value of the uplands".

It is not denied that such unitary ownership was a material factor in that regard, and it is conceded that such evidence "was admitted apparently without objection and without exception". The testimony is referred to as "glowing", as to the developmental possibilities "based upon the exclusive ownership of the tidelands and the development of the tidelands, backed up by unity of ownership with the highlands, and the expressed opinion of experts that this unity of ownership was a very material factor in the valuation of the highlands". But this "glowing testimony", it is conceded, "was admitted apparently without objection and without exception". And the government's brief falls back upon the refusal of the court to give its requested and erroneous instruction, "that the State of California is the owner of *all* land bordering upon the tidewaters within the state, and that the *private ownership* of lands bordering thereon could *only* extend to the ordinary high water mark".

And if it were necessary further to labor the point, this plaintiff itself requested the court to instruct the jury to find "the value of the land *claimed by the defendant*" as a unit and a whole, in its entirety, specifying the full acreage—"2147 acres"; and to instruct the jury, as an additional verdict, to find the value of the land above high water; and to instruct the jury to find, as still another verdict, the value of the tide and submerged land. We quote the language of plaintiff's counsel:

"Mr. Dennis. If your Honor please, I expect to ask the court to instruct the jury to find three verdicts: one, the value of the land claimed by the defendant, 2147 acres; another, the value of the land within the high water, 1297 acres, less a small body of land belonging to the government; third, the value of the lands outside of the uplands, in other words, the tide and submerged lands. Your Honor made that suggestion months ago, and neither side could see its way clear, but as the case has shaped itself, the government expects to ask you to instruct the jury to find those three verdicts" (Tr. p. 42).

Accordingly, the court instructed the jury to find:

"1. The fair market value of the whole of North Island, as of August 1st, 1917.

"2. The fair market value, on August 1, 1917, of the land lying above high water mark, containing 1,232.93 acres, more or less, referred to as mesa land;

"3. The fair market value on August 1, 1917, of the 207.24 acres lying above high water mark, referred to as meadow, marsh, and beach land;

"4. The fair market value, on August 1, 1917, of the lands lying below high water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands" (Tr. pp. 18, 104).

No objection, as we have seen, was taken by plaintiff to the form or language of these verdicts, or to the instruction of the court submitting the same to the jury (Tr. p. 104). The only exception reserved to the instructions, in this behalf,

was, consistently enough, taken by this defendant, which objected "to the returning of anything other than a general verdict" (p. 105).

If, now, the court, as requested by plaintiff at the trial, instructed the jury to find "the value of the land *claimed by the defendant*", full acreage specified, "2147 acres" (Tr. p. 42), it must be that this defendant, all other considerations apart, had the clear right to offer testimony responsive to that issue. Quite apart from the consideration that our ownership extended to the line of anchorage, as defined by the official survey, embracing upland and tideland in a unitary ownership, that was the land, as an entirety, that was "claimed by the defendant" in its full acreage. It is too late, now, for this plaintiff, after proposing such an issue, and after its proposal had been accepted by the court and embodied in the verdict, and the case had been tried, without objection or exception, on that theory, to seek now "to mend its hold" by a change of position.

> "It is not competent to a party to assent to a proceeding in the court below, take his chance of success, and, upon failure, come here and object that the court below had no authority to take the proceeding" (Mays v. Fritton, 20 Wall. 414, 418).

The evidence, as conceded in the government's brief, "was admitted apparently without objection and without exception, expressly directed to prove that the ownership of the tidelands, as a unit with

the uplands, was a material factor in arriving at the value of the uplands". The land "claimed by the defendant" was a unit—upland and tideland; and the form of verdict requested by plaintiff went to the value of that land; to the value of the upland as a part of the same larger unit of which the tideland was claimed to be a component. No instruction was proposed by plaintiff, calling the court's attention to any discrimination in the application of the evidence, as between one form of the verdict and another. Nor was anything in the instructions, as actually given, excepted to by the plaintiff, other than the refusal of the court to give plaintiff's instruction touching the alleged State title, and the giving of the instruction by the court "with reference to the *title* to the submerged lands" (Tr. p. 104)—the instruction, that is to say, which carried our title out to the line of anchorage, as "precisely defined by the United States Survey accompanying the patent" (Tr. p. 105).

If, then, it were necessary,—laying out of view our clear title, unqualified by State ownership, to the line of the official survey—we might well invoke here

> "the salutary rule that a party is not entitled to sit silent until after the verdict, and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called" (Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 72).

The government's brief mentions "an added assignment of error to the action of the court in admitting in evidence the map—Exhibit D"—and assumes to state, in a general way, the ground of the objection. We give the actual record (Tr. p. 47):

> "The WITNESS. I have prepared two maps or diagrams, one on this scale and one on a little larger scale, *illustrating the commercial adaptability of these tidelands, as I understand such adaptability to exist* (map is placed in position on the board).
>
> "Mr. DENIS. Before that map is exhibited. the government wishes to object to it, your Honor, on the ground that it is incompetent, immaterial, and irrelevant.
>
> "The COURT. I understand it is *only* offered *for the purpose of illustrating the testimony of the witness.*
>
> "Mr. DUNNE. Yes, sir; *for no other purpose.*
>
> "Mr. DENIS. That is the basis of the objection—the testimony of the witness to show by map the *subdivision* of the property is irrelevant, incompetent and immaterial, and includes the objectionable evidence of *speculative* value. *I will concede,* of course, that the witness for the defendant may testify to the highest price for which *the property is adaptable,* but I must contest the proposition that in showing that highest price they are permitted *to show the number of residential lots into which that property may be subdivided.* They can testify that it is subject to subdivision, but not to the subdivision of the property into lots, *especially* if it be followed by testimony as to what those lots may be worth *after* subdivision."

The foregoing is the entire objection—beginning, middle and end—to this map.

> "The COURT. Well, I think the latter statement is true—that they would not be permitted to testify to what separate lots are worth.
>
> "Mr. DUNNE. Oh, no. This is a strictly limited offer, for the purpose of illustrating the testimony of the witness.
>
> "The COURT. Well, as a part of the witness' testimony, it may be exhibited to the jury. *It is understood, of course, that the speculative value cannot be put upon this land.*
>
> "Mr. DENIS. The government excepts. Your Honor, can it be stipulated——
>
> "Mr. DUNNE. Yes, indeed, Colonel.
>
> "The COURT. *Rulings* will be excepted to.
>
> "Mr. DENIS. That the rulings will be excepted to.
>
> "The COURT. All right." (Tr. pp. 47-8).

It is not strictly regular in the federal practice, indeed, it is not permitted, that an objection to testimony, followed by a ruling, should be availed of on review, unless the ruling is excepted to.

> "No ruling upon evidence is open to revision, because none appears to have been excepted to" (Hanna v. Maas, 122 U. S. 24, 26; Hutchins v. King, 1 Wall. 53, 60; Wasatch Co. v. Crescent Co., 148 U. S. 293, 298). Nor will the proceedings in the federal court be controlled, in this regard, by the practice or statute of the state (St. Clair v. U. S. 154, U. S. 134, 153).

The Code of Civil Procedure of California, where objection has been made and a ruling taken, dispenses with the exception. This was in the mind

of plaintiff's counsel, for he immediately proceeds to say:

> "Mr. DENIS. I don't know that it is strictly regular, but I thought it would save time.
>
> "The COURT. I think the provisions of the Code of Civil Procedure of California apply here, and you might stipulate it.
>
> "Mr. DUNNE. Yes, sir; and I will join with Colonel Denis.
>
> "Mr. DENIS. Well, I think myself it is advisable to save the time of the court." (Tr. p. 48).

It was then the agreement of counsel, endorsed by the court, to adopt the California practice at the trial—that is to say, when *objections* were made and *rulings* given, *the rulings* should be deemed excepted to.

> "It is the duty of the party excepting to evidence *to point out the part* excepted to, so that the attention of the court may be drawn to it" (U. S. v. McMasters, 4 Wall. 680, 682; Burton v. Griggs, 20 Wall. 125, 133).

Plaintiff's counsel, in stating his objection to the map, observed generally that it was "irrelevant, incompetent and immaterial, and includes the objectionable element of speculative value". So far forth, the objection was "very general and indefinite", it failed "to call the attention of the District Judge to the precise point" wherein the map included a feature or element of speculative value (U. S. v. McMasters, supra; Burton v. Griggs, supra; Upton v. McLaughlin, 105 U. S. 640, 646). Counsel admitted the propriety of tes-

timony as to the property, expressive of "the highest price for which the property is adaptable", and that "it is subject to subdivision". His specific objection was to testimony "as to what those lots may be worth *after* subdivison". The court at once ruled that witnesses "would not be permitted to testify what separate lots are worth", and this defendant's counsel took the same view, and announced that the map was "a strictly limited offer, for the purpose of illustrating the testimony of the witness". The court ruled that

> "it is only offered for the purpose of illustrating the testimony of the witness",

and for that purpose admitted it, with the explicit statement:

> "It is understood, of course, that the *speculative value* cannot be put upon this land."

Counsel for plaintiff, in making his specific objection to what the "residential lots", as he expressed it, "may be worth *after* subdivision", was well within the law when he admitted the propriety of testimony as to the adaptability of the property for such subdivision.

> "The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve

the necessities or conveniences of life" (Boom Co. v. Patterson, 98 U. S. 403, 408).

"What is the value of the property for the most advantageous uses to which it may be applied? That is the proper inquiry."

And again:

"the peculiar fitness of the lands for particular purposes as an element in estimating their value" (Boom Co. v. Patterson, supra, p. 410, p. 409).

The specific and only point of objection made by counsel in respect to 'speculative value" was addressed to the "residential subdivision" of the property, "especially as to what those lots may be worth *after* subdivision". But defendant's counsel did not propose to show any such value, nor did the court intended to admit it. No such value of residential lots, after subdivision, was exhibited by this map, nor, for the matter of that, was it testified to by any witness. There is not a suggestion as to value, of any kind, "looking before or after", on this map.

In Wilson v. Equitable Gas Co., 152 Pa. St. 156, it was said:

"In estimating the value of the lot before taking, its possible and probable uses were important elements, and might be shown by the testimony of expert witnesses."

And again:

"It was competent for the plaintiff to show that a portion of it was ripe for building improvements, or for any other purpose that enhanced its value."

And further:

> "It will be noticed that the case lacks the speculative element in R. Co. v. Cleary, 125 Pa. St. 442. The evidence does *not* show that the witnesses base their testimony upon what they supposed the lots might have been sold for, and the price which they would bring, *after* the pipe line was paid. There was no inquiry as to what a speculator might be able to realize out of a resale of the lots in the future."

The map itself, in its aspect of "residential subdivision", does not even contain a subdivision into lots. No lots are shown. The subdivision is into blocks and streets. Spanish Bight, an arm of San Diego Bay, adjacent to the east side of the property, is available for a yacht harbor or aquatic park, and is so marked—no objection was made to this feature. The only other feature of the map is that of the wharves and piers, to which the tidelands in question are adaptable for commercial purposes. No objection was specified to this feature of the map. An objection was interposed, however, to a question put to Mr. Holmes, after he had testified to the adaptability of the property:

> "Mr. Dunne. In your judgment, having regard to the commercial adaptability of those tidelands on the first of August, 1917, what in your opinion was their fair market value?" (Tr. 50).

This question was objected to by plaintiff's counsel, "unless the witness shows that he was familiar with tideland values in the Bay of San

Diego". It was in the course of discussing this objection that counsel for defendant made the statement referred to in the government's brief:

> "I am now inquiring of this witness his opinion touching the market value of the property, in view of its adaptability for the purposes indicated upon this map, not as to its value when all these improvements have been made and constructed, and you have a going concern—such a value might be fabulous—but its present value, or its value as of the first of August, 1917, in view of the fact that that intact and unbroken waterfront ownership is presently adaptable to these commercial uses, and was so adaptable in August, 1917" (Tr. p. 51).

Whereupon, counsel for plaintiff remarked:

> "The point that I make is not as to the lack of qualifications of this witness, but *I want the witness asked* whether he knows the value of tidelands as of that date, or approximately that date" (Tr. p. 51).

The question objected to was left unanswered, the suggestion of plaintiff's counsel was acted upon, and the following question put to the witness without objection:

> "Now, I will ask you what, in your judgment, was the fair market value of these tidelands, as of August 1, 1917"; and the witness gives his estimate, "between five and six thousand dollars per acre" (p. 51).

This map was made by the witness

> "with a view of the adaptability of the land in August, 1917" (Tr. p. 51) "as I understand

such adaptabilities to exist" (p. 47). "I base my estimate of five to six thousand dollars an acre on these tide lands for their value in August, 1917, as they stood, without any reclamation, from the fact that they were adaptable to be improved, as shown. In this map, and in all of my direct testimony, I took into consideration the business needs of San Diego at that time, or in the immediate future." "It is not a fact, from my knowledge of the business wants of San Diego, that it will be 20 or 25 years before this land can be used, as I have shown it to be adapted. I don't think it would be 20 or 25 years, it might be 10 or 12 years, something like that—business of that sort, when it once starts, grows very rapidly" (Tr. p. 53). "I am trying to indicate that the lands were adaptable in 1917 for such purposes" (Tr. p. 51).

Question by the court:

"In giving your estimate of the value of these lands, did you base your opinion upon anticipated investments of a large amount of money, or expensive improvements and water works, or did you base it upon simply the adaptability of the land as of August first, 1917?

A. I based it upon the adaptability of the land as it was in August, 1917" (Tr. p. 58).

No objection was made to the foregoing testimony of Mr. Holmes.

In the case of Union Terminal R. Co. v. Peet Bros., 48 Pac. 860, 861, it was said by the Supreme Court of Kansas:

"William Peet, President of the Manufacturing Company, was permitted to testify to the business carried on by the Peet Brothers

Manufacturing Company; the size of the buildings already constructed on the west tract; that they had a soap plant at the foot of Delaware street, in Kansas City, Mo.; that they *contemplated* the construction of buildings on the east tract for their soap plant. He was then asked with reference to the kind of buildings they had planned to construct on the east tract, and stated that their plans were to put up a main building, 80x120 feet, 4 stories, with a kettle room adjoining, 50x80 feet, three stories and a basement, for the purpose of manufacturing soap. Various witnesses were asked, in making their estimates for damages, to take into consideration these plans; and in view of the contemplated use of the two tracts together, to state the fair market value of the different tracts of land before and after the appropriation of the right of way.

"Complaint is made of this testimony. It is urged that the jury were led to base their estimate of damages on an air castle, existing then only in the imagination of the witnesses, and which might never take any more substantial form. It is conceded that it was proper to show the various uses to which the tract was adapted, and for the jury to take into consideration any beneficial use to which the property might be put. But it is urged that in this case the testimony went further, and that it was sought to give substance and reality to that which might never actually exist. If the plaintiffs had gone further, and attemptd to show either the value of the east tract *as it would have been* with the buildings *constructed* on it. or the *profits* they might have derived, or the *savings* they might have made by using the *proposed* buildings in connection with the plant they *then* had, there would be great force in the objection to the testimony. But the witnesses were, after all, required to estimate the market

value of the land as it *then* was, before and after the appropriation (of the railroad right of way); and the only purpose for which they were authorized to take the contemplated improvements into account was to determine the value of the property in the condition it was *at the time* of the condemnation. We are inclined to think that the testimony actually given was scarcely more than one method of stating a purpose to which the land was adapted, and that the jury was quite competent to weigh the probabilities of its ever being employed for any such purpose."

In Ry. Co. v. Longworth, 30 Ohio St., pp. 111-112, the court quotes from Cockburn, C. J. (Queen v. Brown, L. R. 2 Q. B. 630), as follows:

"A jury, whether the dispute be as to the value of land required to be taken by the company, or as compensation for damages by severance, in assessing the amount to which the land owner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events at no remote period ("much must be left to the discretion of the presiding judge in determining whether the time was too remote"; Ry. Co. v. Holloman, 114 Pac., p. 701), it may be applied, just as an owner might if he were bargaining with a purchaser in the market. That is the mode in which the land should be valued."

The Supreme Court of Ohio goes on to say:

"This plat was therefore admissible, not only to show the location of the property and the course of the railroad through the same, and

its availability for subdivision into small lots; but also to show that it had been so already subdivided, and as the basis for showing that the property was more valuable in that shape than as an entire tract."

In Ry. Co. v. Holloman, 114 Pac. 700, 701,

"defendant had prepared a plat of the land, showing the same divided into streets and alleys, lots, and blocks, and the location of various objects thereon. * * * After it had been used by plaintiff in the examination of some of its witnesses, defendant, for the purpose of showing the adaptability of the land for townsite purposes, and that it had been surveyed and platted into an addition to the townsite of Frederick, a town of about 3,000 inhabitants, built upon the north half of said section, over the objection of plaintiff introduced the plat in evidence. In this, it is claimed, the court erred, as it completely changed the rule as to the measure of damages. Had the court charged incorrectly on the measure of damages, we might agree with this contention, but as it did not,—or so we presume, since the charge was unexcepted to,—we cannot concur. This was, in substance, the error complained of in Ry. Co. v. Davidson, 49 Kan. 589, a similar proceeding. There the court in the syllabus said: 'Where a railroad company has taken and appropriated land for railroad purposes by virtue of condemnation proceedings, the owner of the land may recover for its depreciation in value, taking into consideration any purpose for which it might be the most profitably used. And in such a case, where the land was situated near a city, and, although used as a farm, was suitable for subdivision into lots, blocks, etc., and for an addition to the city, such facts may be taken into consideration in

determining the market value of the land and the amount of its depreciation in value by reason of the taking and appropriation of a part thereof by the railroad company for railroad purposes'. There, as here, the land owner, to show for what the land might most profitably be used, introduced in evidence, over objection, a plat showing its subdivision into lots, blocks, etc., and the court held the same to be no error."

In Rock Island etc. Ry. Co. v. Gordon, 59 N. E. 810, 811, it was said by the Supreme Court of Illinois:

"Before the petition for condemnation was filed, the appellees had made a plat of the land in question into lots and blocks for residence purposes. A copy of this plat was introduced in evidence upon the hearing of the cause, and appellant complains of its admission as error. It was not pretended that the land had been platted and improved by the grading of streets and sidewalks, etc. On the contrary, it was a fact known to the jury from their personal inspection (as likewise in the case at bar, Tr. p. 43 ad fin.) that the plat represented only a contemplated improvement, to which, as it was thought, the land was adapted. Undoubtedly, if the object had been to enhance the damages by showing that the erection of residences thereon would be a *profitable investment*, the testimony would have been clearly inadmissible. But the plat was merely offered as an illustration of one of the uses to which the property was adapted, and by way of showing the capabilities of the property. The evidence in regard to the plat was *expressly limited to this object* in the questions of *counsel* for the appellees, *and by an instruction upon the subject given by the court to the jury.*"

And in Ry. Co. v. Moore, 15 N. E. 764, 766, it was said by the Supreme Court of Illinois, in respect to property available for wharves and docks, in language applicable as well to property available for residential purposes:

> "If these lots were available for dock purposes, for which, as shown, there was no immediate demand, their *value, when improved* by the building of docks, the *profits* that might be derived therefrom, or the *value* of the lots at some *future time*, as when business or the wants of the community might make *profitable* the making of docks or slips on this property, would be merely conjectural and remote, forming no proper element in estimating the damages to be paid. But if the fact that these lots were located with a frontage on the river, at a place where they could, at some future time, when demanded, be made available as dock property, enhanced their *present* market value in their *then* condition and state of improvement or want of improvement, that fact would be competent and proper to be shown, and be considered by the jury in estimating the damages. If, in consequence of their supposed adaptation to such use, they had an increased market value above what they otherwise would have, such value forms the proper basis of recovery."

Now, then, as was the case in Rock Island etc. Ry. Co. v. Gordon, supra, so, in the case at bar, the subject was covered, and fully, by the instructions of the court. The jury were told:

> "It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted. But it is the tract, and not the lots into which it might be divided, that is

to be valued. You are to value the tract of land, and that only. You are not to determine how it could best be divided into building lots, or to conjecture how fast they could be sold or at what price per lot. A speculator or investor, in deciding *what price* he could *afford to pay,* would consider the chances and probabilities of the situation as *then* actually existing. You should do the same thing. You are not to inquire what a speculator owner might be able to realize *in the future,* but what a *present purchaser* would be willing to pay for it in the condition it was *at the time of the taking.* If the property is available for building lots, or available for commercial purposes or wharves or docks or terminals or industries, or any other legitimate use, even though it may not be used for any of those purposes, or may be left unused by the owner, such availabilities are all to be considered, and they should enter into the estimate of the compensation which must be paid for the land taken. *Mere speculative values, and profits in the manipulation of the property are, of course, to be excluded.* The condition of the property, the use to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the land. But to attempt to ascertain the value by estimating the cost of improvements necessary for its use for a particular purpose, the cost of subdivision and sale, the prospect of sales and estimated profits and increased demands through growth of population, would be speculative. In other words, the value cannot be determined by taking into consideration what would be the earning power of the property after a large investment of capital is made" (Tr. p. 101).

And the court further instructed the jury:

> "Plats and maps of the property in question have been received in evidence and should be considered by the jury, not for the purpose of exhibiting some contemplated improvements or speculative deals, but for the purpose of illustrating the witness's testimony concerning the particular uses to which the property may be adapted in his opinion, and by way of showing the capabilities of such property. With this limitation, and from this point of view, maps and plats have been admitted in evidence in this case, and as thus limited and qualified, it is proper for the jury to consider them for such illustration and enlightenment as they may afford touching the uses and capabilities of the property" (Tr. p. 103).

It is respectfully submitted:

I. Under the Act of July 27, 1917, c. 42, 40 Stat., 247, the judgment of the district court is not removable to this court, for the exercise of appellate jurisdiction, by writ of error.

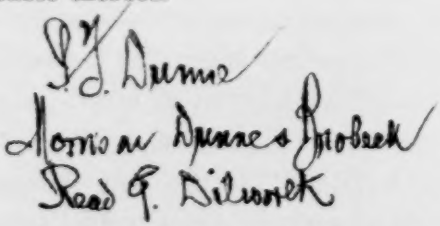
II. The western boundary of "the whole of North Island" is precisely defined to include the tideland area, by the United States patent and the plat of survey accompanying the same and a part thereof. The State of California, as of its sovereign status, never had title to these particular tidelands, lying inside of the boundary line fixed by the United States survey which supervened upon the decree of confirmation and accompanied the patent. These particular tidelands, by elder and patented title, passed in fee simple absolute to the Mexican

grantee, or his successors in interest, pursuant to the confirmation of the Mexican grant.

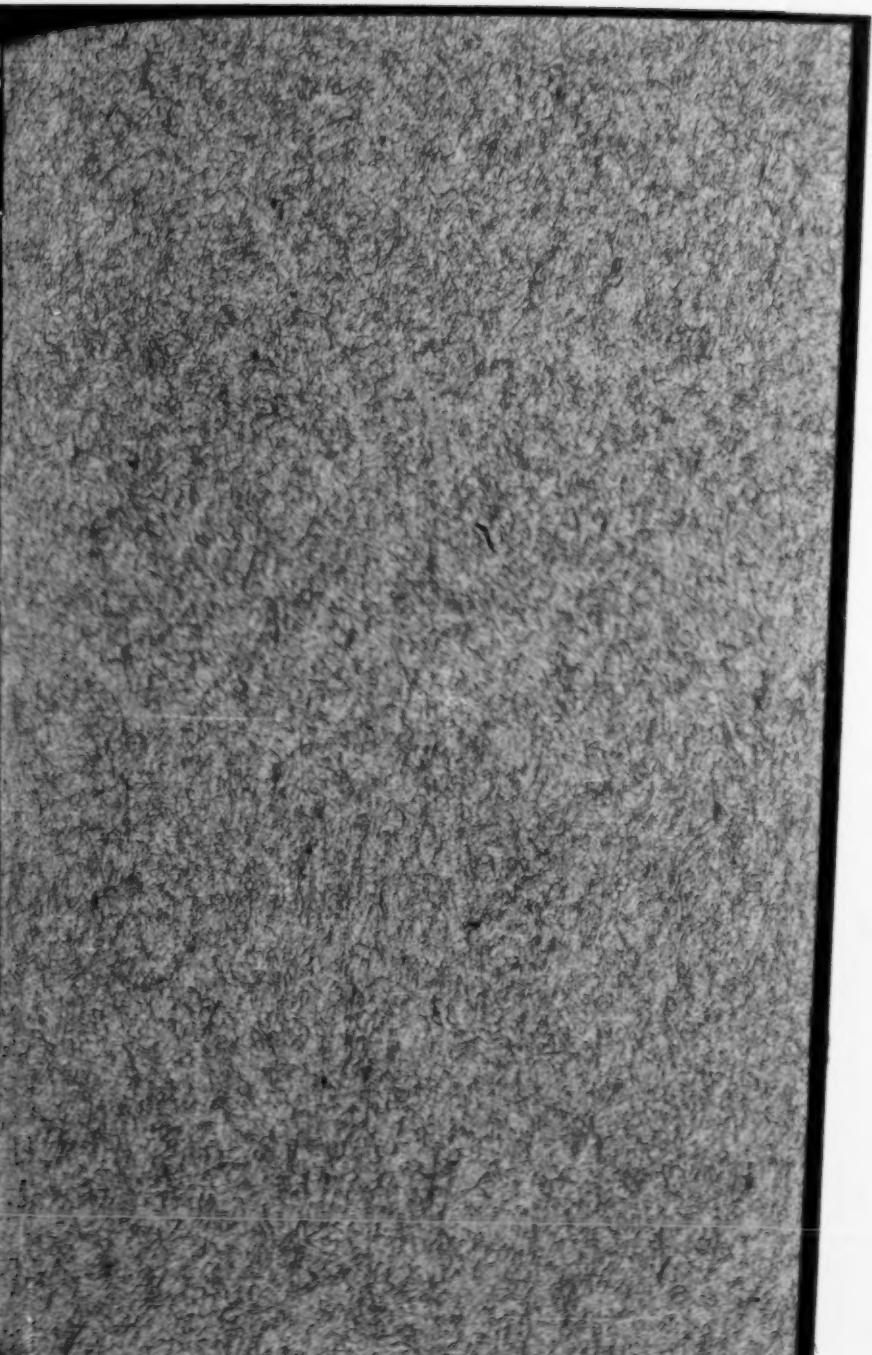
III. The public right of navigation and fishery, and the public regulation of the same, are not in question here.

IV. The appraisement, under the Act of July 27, 1917, c. 42, 40 Stat., 247, is of the whole of North Island, not some part; and the whole of North Island, for the purposes of the appraisement, is measured by "any rights private parties may have in the said island over and beyond any rights thereto in the United States".

V. The instructions to the jury "as to the title to, and character of ownership of, lands under navigable waters", were proper instructions, and no error is predicable thereof.



Attorneys for Defendant.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 525.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CORONADO BEACH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Citation and service	a	1
Bill of complaint	1	1
Answer	6	4
Reply	20	13
Decree	24	15
Conclusions of the court	28	17
Notice of motion to rescind, vacate, and set aside decree	37	23
Order on motion to rescind, vacate, etc	40	24
Statement of evidence to be included in transcript on appeal	42	25
Testimony of C. W. Calbreath	43	26
Plaintiff's Exhibit 10. Petition for grant	43	26
Plaintiff's Exhibit 11. Reports on petition	45	27
Plaintiff's Exhibit 7. Grant to Carrillo	46	28
Plaintiff's Exhibit 1. Petition of Billings et al	48	29
Plaintiff's Exhibit 6. Decree of United States District Court in United States v. Billings et al	49	30
Plaintiff's Exhibit 9. Order of substitution	51	31
Plaintiff's Exhibit 8. Patent United States to Peachy and Aspinwall	52	32
Plaintiff's Exhibit 13. Petition for review in Billings v. United States	59	35
Plaintiff's Exhibit 12. Answer in Billings v. United States	61	36

	Original.	Print.
Plaintiff's Exhibit 14. Mandate from Supreme Court, United States, in Billings v. United States	62	37
Stipulation approving statement of evidence	64	38
Notice of lodgment of statement of evidence	65	38
Petition for appeal	67	39
Assignment of errors	70	40
Order allowing appeal	73	41
Praecipe for record	75	42
Clerk's certificate	77	43
Stipulation for addition to the record	79	44

a UNITED STATES OF AMERICA, ss:

To the Coronado Beach Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, D. C., on the 17th day of Sept., 1920, being within sixty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, in the suit numbered E-34, equity, in the records of said court, wherein The Coronado Beach Company, a corporation, is defendant and appellee, and the United States of America is plaintiff and appellant, to show cause, if any there be, why the decree quieting and establishing the title of the defendant, The Coronado Beach Company, to the land described in said decree, against any and all claims and demands whatsoever of plaintiff, the United States of America, thereto, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the honorable Oscar A. Trippet, United States district judge for the Southern District of California, this 21 day of July, A. D. 1920, and of the independence of the United States the one hundred and forty-fourth.

OSCAR A. TRIPPET,
U. S. District Judge
for the Southern District of California.

b Service of the within citation on appeal is admitted this 23d day of July, 1920.

MORRISON, DUNNE & BROSNICK,
PETER F. DUNNE,
HERBERT W. CLARK,
Solicitors for Coronado Beach Company.

Equity No. E-34. In the Supreme Court of the United States. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Citation. Filed July 24, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

1 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, plaintiff,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant. } Bill of complaint.

To the judges of the District Court of the United States for the Southern District of California:

The United States, by the Attorney General thereof, brings this its bill of complaint against the Coronado Beach Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, residing therein.

And thereupon your orator complains and shows unto the court that the defendant, the Coronado Beach Company, is now, and was at all the times in this complaint mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

Your orator further shows and alleges that the plaintiff is the owner of an easement, estate, and interest in and to the tract of land hereinafter described, for use for the defense or security of the Nation, and in connection therewith, as sites for permanent aviation stations for the Army and Navy and for aviation school purposes. That plaintiff is now, and ever since the first day of August, 1917, has been, in the possession, occupancy, and use thereof for the purposes above mentioned, under and by reason of an Executive order of the President of the United States, dated and issued on said first day of August, 1917, pursuant to an act of Congress of July
2 27th, 1917 (c. 42, 40 Stat., 247), which said tract of land is situated in the county of San Diego, State of California, and is known, designated, and described as the whole of North Island, in the harbor of San Diego, California.

III.

Your orator further shows and alleges that the defendant, the Coronado Beach Company, a corporation, claims to have, own, or hold some right, title, estate, or interest in or to, or some claim or demand upon, said tract of land, or some part thereof, adverse to or in conflict with plaintiff's said easement, estate, and interest therein and thereto; but your orator alleges that said right, title, interest, claim, and demand of said defendant in or to said tract of land, or any part thereof, if any it has, is subject and subordinate to said easement, estate, and interest of the plaintiff in said land for use for the defense or security of the Nation.

IV.

Your orator further shows and alleges that the public interest and necessity require that the possession and use of said tract of land as aforesaid be taken and maintained by plaintiff permanently for the purposes hereinbefore set forth, and that this court inquire into and determine and adjudge any and all interests, estates, claims, or demands of said defendant in or to said tract of land over and beyond any rights therein or thereto in said plaintiff; and that, in the event this court shall find that said defendant has, owns, or holds any right, title, interest, or estate in or to said tract of land over and beyond plaintiff's said easement, estate, and interest therein and thereto, that this court cause such right, title, interest, or estate of said defendant to be appraised and the value thereof deter-

3 mined and adjudged, and that the same be condemned for public use and for the purposes hereinbefore stated.

V.

Your orator further shows and alleges that the names of all the claimants of the said tract of land, or any part thereof, or of any estate or interest therein or thereto, sought to be determined and adjudged, and if necessary appraised and condemned in this action, so far as known to your orator, are set forth in the title of this complaint.

VI.

Your orator further shows and alleges that the description of said tract of land set forth in Paragraph II hereof, includes the whole of an entire parcel or tract of real property.

Wherefore, your orator having no plain, speedy, or adequate remedy at law, prays that the said defendant, the Coronado Beach Company, a corporation, be required by answer to set forth the nature and extent of its claim, estate, and interest in or to the said tract of land, or any part thereof, over and beyond any rights therein or thereto in plaintiff; and that such claim, estate, or interest of said defendant, if any it has, be determined and adjudged to be subject and subordinate to plaintiff's said easement, estate, and interest therein and thereto; and that the defendant be enjoined from claiming or asserting any right, title, interest, or estate in or to said tract of land adverse to or in conflict with plaintiff's said easement, estate, and interest therein and thereto.

Your orator prays that in the event the court shall find that said defendant has, owns, or holds any right, title, interest, or estate in or to, or claim or demand upon, said tract of land, or any part thereof,
4 over and beyond any rights therein or thereto in plaintiff, that the court shall cause such right, title, interest and estate of defendant, and the whole thereof, to be appraised, and the value thereof determined and adjudged; and that upon payment to said defendant, or into court for it, of the value of the same, as so determined, together with interest thereon at the rate of six per centum per annum, from the date the possession of said tract of land was taken by plaintiff as herein alleged, that the court will make and enter a proper decree condemning any and all such estate or interest of defendant in or to said tract of land, for public use for the defense or security of the Nation, and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes; and vesting title in fee simple to said land in the United States.

Your orator prays that a writ of subpœna be issued out of, and under the seal of, this honorable court, directed to the Coronado Beach Company, a corporation, commanding it, on a certain day, and under a certain penalty to be inserted, to be and appear before

this honorable court, and then and there to answer the premises, and to abide such further order and decree as may be agreeable to justice.

Your orator waives answer under oath.

Your orator prays for such other and further relief as to the court may seem equitable, and for costs of this suit.

And your orator will ever pray.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff.

5 (Endorsed:) No. E-34 Eq. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America, plaintiff, *vs.* The Coronado Beach Company, a corporation, claimant and defendant. Bill of complaint. Condemnation proceedings for aviation stations. Filed Aug. 7, 1919. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

6 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant.	No. E 34. In equity.

ANSWER OF CORONADO BEACH COMPANY.

Now comes the defendant Coronado Beach Company and, for answer to the complaint herein, admits, denies, and alleges as follows:

I.

Answering the allegations of Paragraph I of the complaint herein, defendant admits that it now is and at all times in the complaint mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

Answering the allegations of Paragraph II of the complaint herein, defendant denies that plaintiff is the owner of an easement, estate, and interest in and to, or of an easement, estate, or interest in or to the tract of land described in the complaint herein for use for the defense or security of the Nation, or for any purpose or at all,

and in connection therewith, or in connection therewith, as sites for permanent aviation stations for the Army and Navy and for aviation school purposes, or for permanent aviation stations for the Army or Navy, of for aviation school purposes, or for any purpose, or at all.

7 Admits that plaintiff is now, and ever since the first day of August, 1917, has been in the possession, occupancy, and use of the tract of land described in the complaint, for the purposes alleged in the said complaint, under and by reason of an Executive order of the President of the United States, dated and issued on said first day of August, 1917, pursuant to an act of Congress approved July 27, 1917.

Admits that said tract of land is situated in the county of San Diego, State of California, and is known, designated, and described as the whole of North Island, in the harbor of San Diego, California.

III.

Answering the allegations of Paragraph III of the said complaint, defendant admits that it claims to have, own, and hold some right, title, estate, and interest in and to, and some claim and demand upon, said tract of land and all thereof, adverse to and in conflict with the alleged easement, estate, and interest of plaintiff therein or thereto. And in this behalf defendant alleges that at all the times in the complaint mentioned it has been and now is the sole and exclusive owner in fee simple absolute, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description of plaintiff, in or to the same, or any part or parcel thereof, for any purpose whatsoever, of all and singular the tract of land and premises mentioned and described in the complaint herein, and situated in the county of San Diego, State of California, and known, designated, and described as the whole of North Island, in the harbor of San Diego, California. And defendant denies that its said right, title, interest, claim, and demand in or to said tract of land, or that its right, title, interest, claim, or demand in or to said tract of land, or any part thereof, is

8 subject and subordinate, or subject or subordinate, to said alleged easement, estate, and interest, or to said alleged easement, estate, or interest, of plaintiff in said land for the defense or security of the Nation, or for any purpose or at all.

IV.

Answering the allegations of Paragraph IV of the said complaint, defendant denies that the public interest and necessity or the public interest or necessity require or requires that the possession and use, or possession or use, of said tract of land, or any thereof, be taken and maintained, or taken or maintained, by plaintiff permanently, or at all, for the or any purposes set forth in the complaint herein.

V.

And further answering the complaint of plaintiff, defendant alleges that the value of the property, land, and premises sought to be condemned by plaintiff amounts to the sum of seven million five hundred thousand dollars ($7,500,000.00), and that in the event said property, land, and premises, described in the complaint herein, sought to be condemned in this action, are condemned as prayed herein, this defendant will be damaged in the sum of seven million five hundred thousand dollars ($7,500,000.00).

Second defense.

And for another and second defense to the bill of complaint herein defendant alleges:

I.

That on the 20th day of April, 1852, and under and pursuant to the terms and provisions of an act of the Congress of the United States, approved March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and
9 of acts amendatory thereof, Frederick Billings, James R. Bolton, and Henry W. Halleck filed their petition with the Board of Commissioners on Private Land Claims in California, wherein and whereby they presented to the said commissioners for confirmation, their claim to that certain tract of land and real estate in the county of San Diego and State of California, known and described as follows, to wit:

"The island or peninsula of San Diego, situated in said county of San Diego, and bounded on the north by the estero of the port of San Diego towards the town; on the east by the end of the ranch of San Augustin Melijo; on the south by the sea, and on the west by the anchorage for ships."

That thereafter such proceedings were had by and before said board of commissioners concerning said claim, which said claim was numbered 188 on the docket of said board; that on October 31st, 1854, said board of commissioners, by decree rendered, rejected and refused to confirm said claim.

II.

That within six (6) months after the said decision by said board of commissioners, on the said claim No. 188, and under and by virtue of the terms and provisions of the said act of Congress approved March 3, 1851, and of the acts amendatory thereof, the said Frederick Billings, James R. Bolton, and Henry W. Halleck filed with the clerk of the District Court of the United States for the Southern District of California, that being the district court of the district in which the land described in this second defen. was situ-

ated, notice of their intention to prosecute an appeal from the decision of said board of commissioners on said claim No. 188.

III.

That on September 22, 1855, and under and by virtue of the terms and provisions of the said act of Congress and of the acts
10 amendatory thereof, the said Frederick Billings, James R. Bolton, and Henry W. Halleck presented to and filed in the District Court of the United States for the Southern District of California, that being the district court of the district in which the land described in this second defense was situated, their petition setting forth fully the nature of their claim to the lands hereinabove in this second defense described, and the names of the original and then claimants thereto, and containing a deraignment of the title of the said claimants to said land, together with a transcript of the report of the said board of commissioners and of all the documentary evidence and testimony of the witnesses on which said claim was founded, and prayed the said district court to review the decision of the said board of commissioners on said claim No. 188, and to decide on the validity thereof.

That the said petition so presented to and filed with the said district court as aforesaid was filed in cause number 257 on the docket of said court, and that the title of said cause was "Frederick Billings et al., assignees of Bezer Simmons *vs.* The United States."

That thereafter and on December 15, 1855, summons in said cause number 257 issued out of and under the seal of said district court directed to the United States district attorney for the Southern District of California, and, together with a copy of the said petition, was served on the said United States district attorney at Los Angeles, California, on December 26, 1855, as is shown by the return of the United States marshal thereon. That said summons and return were filed and now remain on file in said cause number 257 and are hereby referred to.

That on January 4, 1856, the said United States district at-
11 torney for the Southern District of California filed on behalf of the United States in said cause number 257, then pending in the said district court, an answer to the said petition, denying each and every allegation of the said petition, and denying the validity of the title of the said Frederick Billings, James R. Bolton, and Henry W. Halleck to the land and premises described in the said petition, which said land and premises are the same land and premises hereinabove in this second defense described.

That thereafter, in said cause number 257 on the docket of said district court, such proceedings were had that the said cause came on regularly for trial and was duly and regularly tried on the merits thereof and argued by counsel for the respective parties, and thereupon the said court, at the December term thereof, in the year

1856, duly and regularly made and entered its judgment and decree therein, ordering, adjudging, and decreeing as follows, to-wit:

"This cause coming on to be heard on appeal from the decision of the board of land commissioners to ascertain and settle private land claims in California, upon the transcript of the proceedings and decision of said board and the papers and evidence upon which said decision was founded, and also upon other evidence taken and filed in this court, and counsel for the respective parties having been heard, it is:

"Ordered, adjudged, and decreed that the decision of said board of land commissioners rejecting the claims of the appellants Frederick Billings and others be, and the same is hereby, reversed;

"And it is further ordered, adjudged, and decreed that the title of the appellants Frederick Billings and others to the land claimed by them, as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.

"The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the 'island or peninsula of San Diego,' is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the ranch of San Augustin Melijo, south by the sea, and west by the anchorage for ships, according to the documents of title and map to which reference is had. If the quantity within said boundaries is less than two square
12 leagues, then the confirmation hereby made is for the whole tract; but if the quantity within said boundaries exceeds two square leagues, then the confirmation hereby made is made for two square leagues and no more."

That the said judgment and decree so made as aforesaid was filed in said cause number 257 on January 12, 1857, and entered at page 130 of Judgments and Decrees of the United States District Court for the Southern District of California in the volume thereof containing the judgments and decrees of said court for the period beginning September 10, 1853, and ending December 9, 1865, to which record reference is hereby made.

IV.

That after the rendition and entry of the judgment and decree aforesaid by the said district court, the United States appealed from said judgment and decree to the Supreme Court of the United States, and in that court such proceedings were had that at the December term thereof in the year 1863 it was ordered, adjudged, and decreed by said Supreme Court that the said appeal be and the same was then dismissed; and thereupon a mandate in the usual form was issued out of and under the seal of the said Supreme Court, directed to the judge of the District Court of the United States for the South-

ern District of California, directing and commanding that in the said cause No. 257, on the docket of the said District Court for the Southern District of California, such further proceedings should be had as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

V.

That at the regular April term of the United States District
13 Court for the District of California, in the year 1867, the said mandate of the Supreme Court of the United States was presented to said United States District Court for the District of California, and filed in said cause No. 257, and it was thereupon ordered, adjudged, and decreed by the United States District Court that the appeal theretofore sued out and allowed by the United States from the decree of confirmation rendered in the said cause No. 257 by the late United States District Court for the Southern District of California, be, and the same was, then dismissed, and that the said Frederick Billings, James R. Bolton, and Henry W. Halleck be, and they were thereby, allowed to proceed under said decree of confirmation as under a final decree. That the said order, so made as aforesaid, was filed in said cause No. 257 in the United States District Court for the District of California, and now remains on file therein; and that the said mandate also now remains on file in said cause in said court.

VI.

That at a stated term of the United States District Court for the District of California, held at San Francisco on the 7th day of May, 1867, such proceedings were duly and regularly had by said court in the said cause No. 257 that the said court duly and regularly ordered that Archibald C. Peachy and William H. Aspinwall be substituted in the place and lieu of Frederick Billings, James R. Bolton, and Henry W. Halleck, and the said cause was ordered revived in the names of said Archibald C. Peachy and William H. Aspinwall as claimants and confirmees therein, and all other proceedings therein were ordered to be had in their names. That the said order, so made as aforesaid, was filed in said cause on May 17, 1867, and now remains on file therein.

14 VII.

That the land, real estate, and premises described in plaintiff's complaint herein are, and at all times have been, a part of, and within the exterior boundaries of, the land, real estate, and premises described hereinabove in this second defense; that heretofore, by divers mesne conveyances made, executed, and delivered to it and to its predecessors in interest and title, the defendant herein became

and now is the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises hereinabove in this second defense described; that the cause of action sued upon in said cause No. 257, and the issues adjudicated and determined therein as aforesaid, were and are identical with the cause of action sued upon in and the issues now sought to be raised by the complaint of plaintiff herein; that the decree of confirmation, so as aforesaid rendered and entered by the United States District Court for the Southern District of California, in said cause No. 257, was, is, and remains a final decree upon the merits of said cause and between the parties thereto and their privies; and that the said court had full power, authority, and jurisdiction over the said parties and the subject matter of said cause. And that the decree of said district court confirming the title to the said island or peninsula of San Diego is and constitutes a bar to so much of the present action of plaintiff as seeks to ascertain or determine in plaintiff an easement, estate, or interest therein or thereto for any purpose whatsoever, and the issues tendered by the complaint herein as to such matters are res adjudicata as between the parties hereto.

VIII.

15 That under and by virtue of the terms and provisions of an act of the Congress of the United States approved July 27, 1866, entitled "An act in relation to the District Courts of the United States in the States of California and Louisiana" (14 Statutes at Large, page 300), said United States District Court for the District of California was vested with the power and jurisdiction theretofore had and exercised by the said District Court for the Southern District of California, and had full power, jurisdiction, and authority to proceed as aforesaid in said cause, No. 257, and to make and enter the said orders and decrees therein.

Third defense.

And for another and further defense to the bill of complaint herein defendant alleges:

I.

That on the 11th day of June, 1869, the plaintiff herein made, executed, and delivered to Archibald C. Peachy and William H. Aspinwall its certain instrument in writing, commonly called a patent, wherein and whereby it gave and granted unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever, all and singular the following described land and premises situate, lying, and being in the county of San Diego and State of California, and described as follows, to wit:

"Lot No. forty (40), in township seventeen (17) south, of range three (3) west; lot No. thirty-seven (37), in township eighteen (18)

south, of range three (3) west; and lot No. thirty-eight (38), in township eighteen (18) south, of range two (2) west, of the San Bernardino meridian, containing four thousand one hundred and eighty-five and forty-six one-hundredths (4,185.46) acres."

That the said patent, so made, executed, and delivered as aforesaid, was and is recorded in volume 7 at pages 246 to 249, inclusive, in the Record of Patents, in the General Land Office of plaintiff,
16 and was filed for record in the office of the recorder of the county of San Diego, in the State of California, on July 6th, 1869, and was recorded in book 1 of patents therein, at pages 55 and following, reference to which records, for a more complete description of the said land and patent, is hereby made.

II.

That the land, real estate, and premises described in plaintiff's complaint herein are, and at all times have been, a part of, and within the exterior boundaries of, the land, real estate, and premises described hereinabove in this third defense; and that heretofore and since the issuance, delivery, and recording of the said patent, by divers mesne conveyances made, executed, and delivered to it and to its predecessors in interest and title, the defendant herein became and now is the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises described in plaintiff's complaint.

Fourth defense.

And for another and further defense to the bill of complaint herein, defendant alleges:

I.

That on the 11th day of June, 1869, the plaintiff herein made, executed, and delivered to Archibald C. Peachy and William H. Aspinwall its certain instrument in writing, commonly called a patent, wherein and whereby it gave and granted unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever, all and singular the following described land and premises situate, lying, and being in the county of San Diego, and State of California, and described as follows, to-wit:
17 "Lot No. forty (40) in township seventeen (17) south, of range three (3) west; lot No. thirty-seven (37) in township eighteen (18) south, of range three (3) west; and lot No. thirty-eight (38) in township eighteen (18) south, of range two (2) west, of the San Bernardino meridian, containing four thousand one hundred and eighty-five and forty-six one-hundredths (4,185.46) acres."

That the said patent so made, executed, and delivered as aforesaid, was and is recorded in volume 7 at pages 246 to 249 inclusive, in the Record of Patents, in the General Land Office of plaintiff, and was filed for record in the office of the recorder of the county of

San Diego, in the State of California, on July 6th, 1869, and was recorded in book 1 of patents therein, at pages 55 and following, reference to which records, for a more complete description of the said land and patent, is hereby made.

II.

That the land, real estate, and premises described in plaintiff's complaint herein are, and at all times have been a part of, and within the exterior boundaries of, the land, real estate, and premises described hereinabove in this fourth defense; that heretofore and since the issuance, delivery, and recording of the said patent, by divers mesne conveyances made, executed, and delivered to it, and to its predecessors in interest and in title, the defendant herein became the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises described hereinabove in this fourth defense and now is the sole and exclusive owner in fee simple absolute of all and singular the land, real estate, and premises described in plaintiff's complaint.

III.

That the plaintiff herein ought not to have or maintain against this defendant the cause of action attempted to be set out in the
18 complaint herein, for the determination of its alleged easement, estate, and interest in and to the tract of land described in the said complaint, because the said supposed cause of action, if any there be, accrued more than five (5) years next preceding the 4th day of March, 1896, and the patent hereinabove in this defense mentioned and described issued prior to March 3, 1891, to-wit, on June 11, 1869, and the said claim is barred by the provisions of the act of Congress approved March 3, 1891, appearing in 29 United States Statutes at Large, at page 1099, and acts amendatory thereof.

Wherefore this defendant prays that it may be adjudged and decreed to be the sole and exclusive owner in fee simple absolute of the land, real estate, and premises described in plaintiff's complaint, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character or description, of plaintiff in or to the same, or any part or parcel thereof, whether for use for the defense or security of the Nation or for any purpose whatsoever; that the property in the complaint herein sought to be condemned be not condemned, and that the condemnation thereof be denied; that if said condemnation be had, that the damages to this defendant and the value of the said land be fixed and assessed at seven million five hundred thousand dollars ($7,500,000.00); that judgment in favor of this defendant and against plaintiff, if said land be condemned, be rendered for the sum of seven million five hundred thousand dollars ($7,500,000.00); for its costs in this behalf expended and for such

other and further relief as to the court may seem meet, equitable, and proper in these premises.

MORRISON, DUNNE & BROBECK,
PETER F. DUNNE,
HERBERT W. CLARK,
Solicitors and Attorneys for Defendant Coronado Beach Company.

19 (Endorsed:) In equity. No. E-34. United States District Court, Southern Division, Southern District of California. United States of America, plaintiff, *vs.* Coronado Beach Company, a corporation, claimant and defendant. Answer of Coronado Beach Company. Filed Oct. 25, 1919. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk. Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., attorneys for claimant and deft.

20 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant.	No. E-34. In equity.

REPLY TO ANSWER OF DEFENDANT.

Now comes the plaintiff, United States of America, and for reply to the counter claims set forth in the answer of the defendant herein, denies and alleges as follows:

I.

Plaintiff denies that defendant at all or any of the times in the complaint mentioned, or at any other time or times, has been or now is the sole or exclusive owner in fee simple absolute, free or clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description, of plaintiff, in or to the tract of land mentioned and described in the complaint, or any part thereof; but alleges that the land described in the complaint was granted to one Pedro Carrillo by the then governor of California, Pio Pico, on May 15th, 1846, and that said grant was so made by said governor pursuant to, under the conditions of, and subject to the provisions of, the act of the Mexican Congress of August 18th, 1824, and the rules and regulations of said Congress of November 21st, 1828, and particularly under the provisions of article 5 of said act of August 18th, 1824, and article 8 of said act of November 21st, 1828.

21 II.

Plaintiff denies that the value of the property, land, and premises sought to be condemned by plaintiff amounts to the sum of $7,500,000.00, or to any other sum of money in excess of $————; and

denies that in the event said property, land, and premises described in the complaint herein sought to be condemned in this action are condemned as prayed herein, said defendant will be damaged in the sum of $7,500,000.00, or in any other sum of money in excess of said sum of $————.

III.

Plaintiff denies that the cause of action referred to in Paragraph VII of the second defense set forth in said answer and sued upon in cause No. 257, on the docket of the United States District Court for the Southern District of California, or the issues adjudicated or determined therein, were or are identical with the cause of action sued upon in, or the issues now sought to be raised or now raised by the complaint of plaintiff herein. And plaintiff denies that the final decree of confirmation rendered and entered by the said United States District Court, in said cause No. 257, was, is, or remains a final or other decree upon the merits of said cause, or between the parties thereto or their privies; or that the said court had full power, authority, or jurisdiction over the said parties or the subject matter of said cause, if thereby defendant intends to allege that the court in said Paragraph VII, referred to, had the power, authority, or jurisdiction to enter a decree in said action confirming to the petitioners therein a fee simple title absolute, or any other or further title than that granted to the predecessor in interest of said defendant, to wit, the said grantee under the said Mexican grant of May 15th, 1846; and plaintiff further denies that the decree of said
22 United States District Court in said cause No. 257, confirming the title to the said island or peninsula of San Diego, is or constitutes a bar to so much of the present action of plaintiff as seeks to ascertain or determine in plaintiff an easement, estate, or interest therein or thereto, or to any part of plaintiff's cause of action herein; and denies that the issues tendered by the complaint herein as to such or any matters are res adjudicata, as between the parties hereto.

IV.

Plaintiff denies that on the 11th day of June, 1869, or at any other time, the plaintiff made, executed, or delivered to Archibald C. Peachy or William H. Aspinwall, its certain, or any, instrument in writing wherein or whereby it gave or granted unto the said Archibald C. Peachy or William H. Aspinwall, or to their heirs or assigns, any greater interest, right, title, or estate in or to the land described in Paragraph I of the third defense set forth in said answer, than the interest, right, title, and estate therein adjudged and confirmed in and by the decree of confirmation so entered in said cause No. 257, in said United States District Court; which said right, title, interest and estate plaintiff alleges was at all times, and now is,

subject and subordinate to the easement and estate of plaintiff therein. And plaintiff denies that since the issuance of the said patent, or at any time, by divers, or any, mesne conveyances made, executed, or delivered to it, or to its predecessors in interest or title, the defendant herein became, or now is, the sole or exclusive owner in fee simple absolute of all or singular the land, real estate, or premises described in plaintiff's complaint.

V.

23 Plaintiff denies that the said claim and cause of action set forth in the complaint herein, or any part thereof, is barred by the provisions of the act of Congress approved March 3, 1891, appearing in 29 United States Statutes at Large, at page 1099, or by any acts amendatory thereof, or at all.

Wherefore plaintiff prays for judgment according to the prayer set forth in its bill of complaint herein.

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Attorneys for Plaintiff.

(Endorsed:) In equity No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Coronado Beach Company, a corporation, claimant and defendant. Reply to answer of defendant. Filed Oct. 30, 1919. Chas N. Williams, by R. S. Zimmerman, deputy clerk. Geo. J. Denis, 832 Van Nuys Building, Los Angeles, Cal. Attorney for plaintiff.

24 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, plaintiff, v. CORONADO BEACH COMPANY, A CORPORATION, defendant.	No. E-34.	In equity.

DECREE.

This cause came to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That the plaintiff, United States of America, has no easement, estate, interest, right, title, claim, or demand of any kind, character, or description in or to the land mentioned and described in the bill

of complaint herein, and more particularly described, designated, and set out in the said bill of complaint as the whole of North Island, in the harbor of San Diego, in the county of San Diego and State of California, or in or to any part or parcel thereof, for use for the defense or security of the Nation, or for any purpose whatsoever or at all, except that as to those certain pieces or parcels of land within the exterior limits of the said North Island which are described in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded September 12, 1901, in book No. 312 of deeds, at page 185 et sequitur, of the records
25 of said county of San Diego, California, containing thirty-eight and fifty-six hundredths (38.56) acres, more or less, and in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded in book No. 211 of deeds, at page 381 et sequitur, of the records of said county of San Diego, California, containing eighteen and eighty-five hundredths (18.85) acres, more or less, the United States of America is the owner in fee simple of said certain pieces or parcels;

That the claimant and defendant herein, Coronado Beach Company, a corporation, was, at the time of the commencement of this suit ever since has been, and now is the sole and exclusive owner in fee simple absolute of all and singular the land mentioned, designated, and described in the bill of complaint herein and more particularly described, designated, and set out in the said bill of complaint as the whole of North Island, in the harbor of San Diego, in the county of San Diego and State of California, free and clear of any easement, estate, interest, right, title, claim, or demand of any kind, character, or description, of plaintiff, the United States of America, in or to the same, or in or to any part or parcel thereof, for use for the defense or security of the Nation or for any purpose whatsoever or at all, except as to the aforesaid certain pieces or parcels hereinabove in this decree specified and of which the United States of America is the owner in fee simple;

That the title of claimant and defendant, Coronado Beach Company, a corporation, in and to the land in the said bill of complaint described, and in and to every part and parcel thereof, except as to the aforesaid certain pieces or parcels of land hereinabove in this decree specified, be, and the same hereby is, quieted and estab-
26 lished against any and all claims and demands whatsoever of plaintiffs, the United States of America.

Done at Los Angeles, this 15th day of March, 1920.

TRIPPET, *Judge.*

Approved as to form, as provided in rule 45.

GEO. J. DENIS,
Special Assistant to the Attorney General of the United States.

Decree entered. Recorded this 15th day of March, 1920.

CHAS. N. WILLIAMS, *Clerk.*
By ERNEST J. MORGAN, *Deputy Clerk.*

27 (Endorsed:) E 34 Eq. United States District Court Southern Division Southern District of California. United States of America, plaintiff, vs. Coronado Beach Co., a corporation, claimant and defendant. Decree filed Mar. 15, 1920. Chas. N. Williams, clerk, Ernest J. Morgan, deputy, Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal.

28 In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CORONADO BEACH COMPANY, A CORPORATION, DEFENDANT.
No. E–34. Equity.
Conclusions of the court.

A. Mitchell Palmer, Attorney General; Geo. J. Denis, special assistant to the Attorney General; Robert O'Connor, United States attorney for plaintiff.

Morrison, Dunne & Brobeck, of San Francisco, California, for defendant.

This suit is being prosecuted in pursuance of an act of Congress of date July 27, 1917 (40 U. S. St. L. 247). This act provides that the suit shall be prosecuted in accordance with the laws of the State of California, relating to the condemnation of property for public use. The suit is for the determination and appraisement of any rights the defendant may have in North Island, in the harbor of San Diego, California, and for the condemnation of such rights. The Government took possession of this island and now seeks to condemn the defendant's interest therein, under the above-mentioned act, for use for national defense and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes.

On August 18, 1824, the sovereign general constituent congress of the United Mexican States issued a decree, concerning colonization and settlement of the national lands of said Republic. This decree
29 provides: * * * (Art. 4) That those territories within ten leagues of the seacoast can not be colonized "without the previous approval of the supreme general executive power." (Art. 5) "If for the defense or security of the nation the Federal Government shall find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general congress," etc. * * * (Art. 16) That the Government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the Republic. On November 21, 1828, in pursuance of article 15, the Government, through his excellency, issued rules and regulations for the colonization of the territories of the Republic.

The Mexican Government granted the land in controversy to one Pedro Carillo, a Mexican citizen, on May 15th, 1846. This grant was made by Pio Pico, the governor of California, and recites:

"Whereas Don Pedro Carillo has for his personal benefit and that of his family petitioned for the land known as the island or peninsula in the port of San Diego, the proper examinations being previously made, using the faculties which are conferred on me in the name of the Mexican nation, I have granted him the aforesaid land in decree of this day, declaring to him the ownership of it by these presents, in conformity with the law of August 18, 1824, and the regulations of Nov. 21, 1828, subject to the approval of the most excellent departmental assembly, and under the following conditions"; etc.

This recitation was made in the grant to comply with article 8 of the Rules and Regulations of November 21, 1828. It does not appear in the record that the grant was made with the approval of the supreme general executive power, as provided by article 4 of the decree of August 18, 1824. By virtue of the treaty of Guadalupe Hidalgo, Congress, on March 3, 1851, enacted a law entitled, "An act to ascertain and settle the private land claims in the State of California."

Pursuant to this act of Congress, Billings and others, as-
30 signees of Carillo, the Mexican grantee, instituted proceedings against the United States before the commissioners created by said act, and subsequently, in the District Court of the United States, to have the said title confirmed to them. The board of commissioners rejected the claim of Billings and others, but the district court confirmed it on the 12th day of January, 1857. The only parties to said suit were Billings and others, as plaintiffs, and the United States as defendant. However, before a patent was issued by the United States for the land, other parties were substituted for Billings and others. The patent issued to the successors of Carillo makes the following recitation:

"Now know ye, that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of 3d March, 1851, and the legislation supplemental thereto, have given and granted and by these presents do give and grant unto the said Archibald C. Peachy and William H. Aspinwall and their heirs the tract of land embraced and described in the foregoing survey, but with the stipulation that in virtue of the 15th section of the said act the confirmation of the said claim and this 'patent' shall not effect the interest of third persons."

"To have and to hold the said tract with the appurtenances unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever, with the stipulations aforesaid."

The title acquired under this patent passed to the defendant.

The plaintiff claims that the grant to Carillo created a fee in the grantee, subject to the reservation provided in article 5 of the act of August 18, 1824, above quoted; and claims that the patent was simply a confirmation of such title and that the right reserved to

the Mexican Government passed to the United States by virtue of the treaty of Guadalupe Hidalgo.

On the contrary, counsel for the defendant contends that the grant to Carillo passed a fee-simple title, and claims that the first
31 eight articles of the decree of 1824 referred only to foreign colonization and not to grants made to citizens of Mexico, and is applicable only to States and not to the territory of the Republic.

In Arguello *v.* U. S., 18 How., 539, at the December term, 1855, the Supreme Court, in discussing this question, used the following language:

"It is evident from an inspection of this act of 1824 and consequent regulations of 1828, that they contemplate two distinct species of grants. 1. Grants to impresarios, or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers. 2. The distribution of lands to Mexican citizens, 'families or single persons.'

"While these countries were under the dominion of Spain, the governors had authority to make grants of the latter description, while those of the former required the sanction of the king. As examples of such colonization contracts in Louisiana, those of the Marquis of Maison Rouge and the Baron de Bastrop may be referred to. They came under the consideration of this court in the cases of the United States *v.* King and Coxe, 7 How., 833, and the United States v. Philadelphia, 11 How., 609. These contracts were executory. They designated a certain tract of country, which was 'appropriated' to be gratuitously distributed among the colonists, but did not confer an absolute or immediate title to the whole tract to be colonized by the contractor. 'As the object of these grants was to obtain a body of foreign agriculturists, who would settle together under one common leader, in whom the Government could confide, liberal terms were offered. A body of such colonists, besides opening, cultivating, improving the wild lands, served as a protection against the Indians and created inducements to others of their countrymen to join them, and thus promote the early settlement of the Province.'

"The same policy was pursued by the Mexican Government. Besides the desire of fortifying themselves against apprehended attempts at subjugation by Spain, they had before their eyes the prosperous growth of the United States consequent on the liberal encouragement of European immigration. But, while anxious to encourage immigration of foreigners, they nevertheless, entertained some jealousy, well founded perhaps, that in case of conflict with a powerful neighbor, their sympathies and allegiance might not be safely relied on.

"Hence the caution exhibited in requiring the approval of the supreme government 'to grants made to impresarios' for them to 'colonize with many families.' But while a judicious policy might prevent the settlement of large bodies of foreigners on the boundaries and seacoast, we can not impute to them the weakness or folly of con-

fining their native citizens to the interior and thus leaving their seacoast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners would encourage the settlement of natives within those bounds.

32 "The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers; proffering gratuitous grants of land and of agricultural implements, expenses of their voyage, maintenance for a year, and leave to import certain articles free of duty. The miltiary posts in the territory were on the seacoast; and it would be strange policy, indeed, which would isolate the posts intended for the protection of settlers, and compel them to dwell among the savages without protection. Numerous enactments also exhibit their cautious jealously with respect to foreigners, and especially their coterminous neighbors on the north. An act of 1828 directs all Spaniards living on the coast of the Mexican Gulf to retire twenty leagues from it. Another, of 1830, prohibits settlements of foreigners from coterminous nations or any part of their border States.

"A careful examination of this decree of 1824, and regulations of 1828, will show that their letter conforms to this policy, pursued with so much solicitude. The title to the decree shows its subject to be 'colonization.' The term colonization implies immigration in numbers. The first section speaks of the subjects of such colonization as 'foreigners.'

" It guarantees to them security of person and property. The second and third describe the lands open to such colonists, and require the States to make rules and regulations for colonization within their limits. The fourth (whose construction is now under consideration) forbids the colonization of the territory comprehended within twenty leagues of the boundaries of any foreign State and within ten leagues of the seacoast without the consent of the supreme executive power. The sixth section provides that no duties shall be imposed on the entrance of 'foreigners.' The seventh forbids the immigration of 'foreigners' to be prohibited prior to 1840, except of some particular nation and under peculiar circumstances. The seventh indicates the possibility that the Government may find it necessary to take measures of precaution for the security of the federation with respect to foreigners who come to colonize.

"These are all the sections of the act which refer directly to colonization. The subjects of it are called 'foreigners' throughout. They are the only persons to whom the fourth section has any reference or application.

"The 9th section first speaks of the 'distribution of lands' to individuals and families as distinguished from colonists, and provides that Mexican citizens should be preferred, without distinction of classes, except as to those who have rendered special service to their country.

"Thus we have seen that the first eight sections apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them to the subject introduced for the first time in the 9th section, or to select the 4th section as applicable to native citizens, while the other seven are confined by their terms to 'foreigners.'

"The regulations of 1828, made for the purpose of carrying
33 into execution the law of 1824, evidently give this construction to that act. It makes a clear distinction between empresario contracts for colonization and grants to Mexican citizens. In conformity with the 4th section of that act, it requires grants to empresarios to have the sanction of the supreme government, while those made to individuals or families need only the approval of the territorial deputation. This may be said to be a legislative construction of the act of 1824 and demonstrates that this restraint of grants within the lateral (sic., littoral) leagues had no application except to colonies of foreigners."

Necessarily, the district court, in confirming this grant, was guided by the decision on the Arguello case. Article 5 of the act of 1824 was not involved in the Arguella case, except incidentally, but the reasoning in that case necessarily precludes the idea that article 5 could apply to citizens of Mexico, while all the other articles, from 1 to 8, inclusive, apply only to foreigners. It will be seen that the Supreme Court includes article 5 among the eight articles, which, it holds, apply to foreigners and not to citizens. We might well use the language of the Supreme Court, above quoted, making the reference to article 4 read article 5, thus:

"We have seen that the first eight sections (or articles) apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them to the subject introduced for the first time in the ninth section, or to select the fifth section as applicable to native citizens, while the other seven are confined by their terms to foreigners."

It would also seem that the Mexican Government could with as much propriety have made a distinction between a Mexican citizen and a foreigner concerning the right of occupancy, as provided in article 5, as to have made the distinction in article 4.

It seems to the court that this decision of the Supreme Court of the United States is controlling upon this court.

The court might well stop here without further comment, but the question of res adjudicata has been carefully investigated, and
34 it is not inappropriate to make the following comment:

Section 15 of the act of March 3, 1851, provides:

"That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

In construing this section the Supreme Court, in the case of Botiller *v.* Dominguez, 130 U. S., 238, p. 248, says:

"The fifteenth section declares that the final decrees rendered in such cases, or any patent issued under the act, 'shall be conclusive between the United States and the said claimants only'; that is to say, it shall be conclusive on the United States and on the claimants, but it shall not conclude the rights of anybody else, if in a position to contest the action of the board.

* * * * * * *

"When this was done, the aim of the statute was attained. The order of the commissioners or the decree of the court established as between the United States and the private citizens the validity or the invalidity of such claims, and enabled the Government of the United States, out of all its vast domain, to say 'this is my property,' and also enabled the claimant under the Mexican Government who had a just claim, whether legal or equitable, to say 'this is mine.' This was the purpose of the statute; and it was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican Government should be established, as that imperfect claims should be established or rejected.

* * * * * * *

"We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by strict legal title, to private persons."

In the Botiller case the court was deciding a controversy between two claimants in an action wherein the United States was not a party, but what the court said in that case is appropriate to a decision in the case at bar. The statute and said decision as to the effect that the patent shall be conclusive on the United States. Certainly if it is conclusive on anybody in view of this statute it ought to be conclusive on the United States. A patentee under this statute could not assert with very much confidence concerning the land he got, that "this is my property," if the United States could step in at any time and take possession of it forever.

This court is of the opinion that the claim of the plaintiff is not well made for the foregoing reasons.

OSCAR A. TRIPPET,
Judge.

The defendant will prepare a decree and proceed as provided in rule 45 of this court.

Dated December 29, 1919.

(Endorsed:) Original. No. E-34 Equity. U. S. District Court, Southern District of California, Southern Division. United States of America, plaintiff, *vs.* Coronado Beach Company, a corporation, defendant. Conclusions of the court. Filed Dec. 29, 1919, Chas N. Williams, clerk, by R. S. Zimmerman, deputy.

37 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, plaintiff, *vs.* THE CORONADO BEACH COMPANY, a corporation, claimant and defendant.	No. E–34. *Notice of motion to rescind, vacate, and set aside decree.*

To the above-named defendant, and to Messrs. Morrison, Dunne & Brobeck, Peter F. Dunne, Esq., Herbert W. Clark, Esq., R. G. Dilworth, Esq., and James E. Wadham, Esq., its attorneys:

You and each of you will please take notice that the plaintiff herein, United States of America, will move the court in the above entitled action, on Monday the 31st day of May, 1920, at the hour of 10 o'clock, a. m., of said day, or as soon thereafter as counsel can be heard, to rescind, vacate, and set aside the decree made and entered in said action on the 15th day of March, 1920, quieting the defendant's title to the land and premises described in said decree, upon the ground that said decree is against law.

Said motion will be made and based upon the pleadings, files, records, and exhibits in said cause.

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney,
Southern District of California,
Attorneys for Plaintiff.

38 Points and authorities: Foster's Federal Practices; Bronson *v.* Schulten, 104 U. S., 26 L. Ed. 799; Rockwell, Spanish & Mexican Law; Arguello *v.* United States, 18 How., 15 L. Ed. 478; The cases cited on oral argument by plaintiff.

39 No. E–34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Notice of motion to rescind, vacate, and set aside decree. Filed May 20, 1920. Chas. N. Williams, clerk, by Emyr E. Jones, deputy clerk.

40 At a stated term, to-wit, the January, A. D. 1920, term, of the District Court of the United States within and for the Southern Division of the Southern District of California, held in the court room thereof, in the city of Los Angeles, on Tuesday, the 1st

day of June, in the year of our Lord one thousand nine hundred and twenty.

Present: The honorable Oscar A. Trippet, district judge.

UNITED STATES OF AMERICA, PLAINTIFF, vs. CORONADO BEACH COMPANY, DEFENDANT.	No. E–34 equity. SD.

This cause coming on at this time for hearing on (1) on motion to rescind, vacate, and set aside decree; and (2) for motion for new trial; Geo. J. Denis, Esq., special assistant to the Attorney General, and Gordon Lawson, Esq., assistant U. S. attorney, appearing as counsel for the plaintiff, and Herbert W. Clarke, Esq., appearing as counsel for the defendant, and W. C. Wren appearing as shorthand reporter of the proceedings and testimony, and a judgment having been signed by the court in open court and directed to be filed herein, and recorded in judgment book No. 2 for the southern division at pages 565 to 572, both inclusive; and

Geo. J. Denis, Esq., special assistant to the Attorney General, having presented the argument in support of motions to rescind, vacate, and set aside decree, and of motion for new trial; and

Now, at the hour of 11.28 o'clock a. m., the court having taken a recess; and

41 Now, at the hour of 11.36 o'clock a. m., the court having reconvened, and counsel for respective parties being present as before; and W. C. Wren being present as shorthand reporter; and

Geo. J. Denis, Esq., of counsel, as aforesaid, for the plaintiff, having resumed the argument in support of the aforesaid motions; and

Now, at the hour of 12.00 o'clock noon, it is ordered that a recess be taken until the hour of 2 o'clock p. m. of this day, and this cause is continued to that time.

Now, at the hour of 2 o'clock p. m., the court having reconvened, and counsel for respective parties being present as before; and W. C. Wren being present as shorthand reporter; and

Geo. J. Denis, Esq., of counsel, as aforesaid, for the plaintiff, having presented further arguments in support of said motions to rescind, vacate, and set aside the decree and for motion for a new trial; and

Herbert W. Clarke, Esq., of counsel, as aforesaid, for the defendant, having presented the argument in opposition to said motions; and

Geo. J. Denis, Esq., of counsel, as aforesaid, for the plaintiff, having replied thereto; and

The Court at this time gives its oral opinion and orders that said motions to rescind, vacate, and set aside the decree and motion for new trial be, and they hereby are, denied.

42 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT and defendant. | No. E-34.

STATEMENT OF EVIDENCE TO BE INCLUDED IN TRANSCRIPT ON APPEAL.

The preliminary question, to wit, the determination of any rights said defendant may have in North Island, in San Diego Bay, California, over and beyond any rights thereto in the United States, was heard and determined upon the foregoing bill of complaint, the defendant's motion to dismiss said bill of complaint, the defendant's answer to said bill of complaint, and the plaintiff's reply to the answer of defendant, and upon the following proceedings and evidence:

It was stipulated by and between the parties plaintiff and defendant:

(1) That the premises described in the complaint herein, to wit, North Island, in the harbor of San Diego, in the county of San Diego, California, are included within and are a part of the land described in that certain decree of confirmation rendered by the United States District Court for the Southern District of the State of California at the December term thereof, in the year 1856, in a proceeding therein pending entitled Frederick Billings et al., assignees of Bezar Simmons, vs. the United States, numbered 257 on the docket of said court; and that the said premises are included within and are a part of the land described in that certain
43 patent dated June 11, 1869, and issued by the United States of America to Archibald C. Peachy and William H. Aspinwall, which said patent is described and referred to in the third and fourth defenses interposed by the defendant herein to the complaint of the plaintiff.

(2) That the defendant, Coronado Beach Company, has succeeded to and, with the exception of two small tracts aggregating 57.41 acres, more or less, heretofore conveyed by the defendant to the plaintiff, is now the owner of all and singular the right, title, and interest of the confirmees named and described in the said decree of confirmation in said proceeding number 257 in and to North Island aforesaid, and has succeeded to and is now, with said exception, the owner of all the right, title, and interest of the said patentees, Archibald G. Peachy and William H. Aspinwall, in and to said North Island.

(3) That the defendant, Coronado Beach Company, has paid all taxes levied or assessed upon the premises described in the complaint herein since the issuance of the said patent dated June 11, 1869.

C. W. CALBREATH, called on behalf of plaintiff, duly sworn, testifies:

My name is C. W. Calbreath. I live in San Francisco, and am deputy clerk of the United States District Court for the Northern District of California. I have produced, under the subpœna ad testificandum, the record in case No. 257, docket of the United States District Court for the Southern District of California.

Mr. DENIS. Now, I propose to offer copies of certain parts of that transcript that I deem material.

I offer what is designated on page 11 of the certified copy of the transcript of case No. 257, as the translation of espediente,
44 being the petition of Pedro C. Carrillo to the governor of California, asking for a grant of the island or peninsula in the port of San Diego, with the endorsements thereon. Said document, filed as plaintiff's Exhibit 10, is in the words and figures following, to wit:

Translation of espediente.

SAN DIEGO, *April 21st, 1846.*

The 2d magistrate of this town will be pleased to inform relative to the petition made by Don Pedro C. Carrillo if the place he petitions for is vacant, or if it belongs to any individual, corporation, and this being complied with, he will return the espediente to this subprefecture for the other purpose.

ARGUELLO,
Senior Sub Prefect of the Portido of San Diego.

Pedro C. Carrillo, native of this department of California and resident in this port, before you with due respect and in conformity with law, appears and says: That being in want of the proper land for the breeding of cattle, both large and small, and horses, and desirous of encouraging these kinds of property he names a vacant land in the limits of this port in the southern part known by the name of "la Ysla" or peninsula which the port of San Diego forms, the which contains a little more or less, two leagues or "sition" according to the map which he transmits, said land being fit for a cattle farm, for which purpose he asks for it, and is founded on the north by the "estero" (creek) of said port, east by the place of Don Augustin Meliso; south by the sea, and west by the bay and ship anchorage, and he prays you that after the informations which you may think proper to take, you will be pleased to grant it to him, passing the espediente to his excellency the governor of the department that he may have the goodness to order the corresponding title of ownership to be issued to him.

45 Wherefore, I pray and beseech you to be pleased to provide in the manner and form which I have asked, in which I will receive grace and favor; swearing not to act from malice, and what-

ever else may be necessary; admitting this on common paper for want of stamped.

San Diego, April 21st, 1846.

(Signed) PEDRO C. CARRILLO.

Mr. DENIS. I offer the reports on that petition, found on page 12, and the endorsement on the espediente translation, also found on page 12, under date of April 21, 1846, and signed by Pio Pico and Jose Matias Moreno, secretary. Said document, filed as Plaintiff's Exhibit No. 11, is in the words and figures following, to wit:

SAN DIEGO, *April 21', 1846.*

The place which citizen Pedro C. Carrillo asks for is at present entirely vacant, and does not belong to any ownership, and consequently may be granted to him.

(Signed) JUAN MARIA OSUNA.

MOST EXCELLENT SIR: From the information asked with respect to the place of "La Ysla" or peninsula, which citizen Pedro C. Carrillo—it results that it is entirely vacant, so that it being granted would cause no injury to a third person; wherefore, if the superior authority thinks proper, it can grant it to the petitioner, as he is without any land of his own and combines in his person the requisits of colonization.

San Diego, April 21', 1846.

(Signed) JOSE R. ARGUELLO.

ANGELES, *May 15', 1846.*

Having seen the petition with which this espediente commences, the necessary reports, with all other things which were
66 represented and deemed proper to be seen in conformity with the law of August 18th, 1824, and regulation of November 21', 1828, I declare Don Pedro Carrillo owner in fee of the land known or named "Isla" or peninsula in the port of San Diego, towards the part of —— of the anchorage. Let the corresponding title be issued and reserve the espediente in order to submit it to the approval of the most excellent departmental assembly.

Pio Pico, constitutional governor of California, thus ordered, decreed, and signed, I certify.

(Signed) PIO PICO.
(Signed) JOSE MATIAS MORENO,
Secretary.

Filed in office Sept. 22d, 1852.

GEO. FISHER, *Sec'y.*

Mr. DENIS: I offer in evidence a translation of the grant by Pio Pico, constitutional governor of the department of California, to Pedro Carrillo, of date May 15, 1846, found on pages 14 and 15 of

the certified copy of the transcript of case No. 257 above referred to. The document last above offered, filed as plaintiff's Exhibit No. 7, was read to the court, and is in the words and figures following, to-wit:

Pio Pico, constitutional governor of the department of California. (Seal.)

Whereas Don Pedro Carrillo has for his personal benefit and that of his family petitioned for the land known as the island or peninsula in the port of San Diego, the proper examinations being previously made, using the faculties which are conferred on me in the name of the Mexican Nation, I have granted him the aforesaid land in decree of this day, declaring to him the ownership of it by these presents, in conformity with the law of August 18', 1824, and the regulations of Nov. 21', 1828, subject to the approval of the
47 most excellent departmental assembly, and under the following conditions:

1'. He may enclose it, without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use or cultivation of it as may best suit him.

2d. He shall request the proper magistrate to give him juridical possession in virtue of this order, by whom the boundaries will be marked out.

3d. The land of which donation is made is two square leagues and is bounded on the north by the estero of the port of San Diego toward the town, east by the end of the rancho of San Augustin Melino, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance.

In consequence, I order that the present title being held as firm and valid, note be made of it in the corresponding book and it be delivered to the party interested for his security and other purposes.

Given in the city of Los Angeles, on this common paper for want of stamped, on the 15th of May, 1846.

(Signed) PIO PICO,
(Signed) JOSE MATIAS MORENO,
Secretary.

Note has been made of this superior order in the proper book.
(Signed) MORENO.

Note has been made of this superior order on (page) 5, over in the proper book in this sub-prefecture in my charge.
(Signed) JOSE R. ARGUELLO.

Filed in office April 20th, 1852.
GEO. FISHER, *Sec'y.*

48 Mr. DENIS. I offer in evidence petition of Billings and others, assignees of Bezar Simmons, to the commissioners to settle private land claims in California, appointed under the act of 1851.

The document last above offered, filed as Plaintiff's Exhibit No. 1, is in the words and figures following, to-wit:

To the honorable commissioners to settle private land claims in California:

The petitioners, Frederick Billings, James R. Bolton, and Henry W. Halleck, assignees of Bezar Simmons, respectfully show:

That on the 15th day of May, 1846, Pio Pico, Governor of California, by virtue of authority in him vested, granted to Pedro C. Carrillo, the island or peninsula of San Diego, situate in the present county of San Diego, containing two quare leagues, with the boundaries described in the grant, a copy of which is submitted herewith marked "A," with a translation marked "B."

That on the 20th day of October, 1846, the said Pedro C. Carrillo sold and conveyed the said tract of land to the said Bezar Simmons, a copy of which conveyance is submitted herewith marked "C," with a translation marked "D."

That on the 3d day of September, A. D. 1850, the said Bezar Simmons, by deed of assignment, conveyed the said tract of land to the petitioners, a copy of which deed of assignment is submitted herewith marked "E."

And the petitioners further show that the said land has not been surveyed by the Surveyor General of the United States, such survey, from the nature of the case being unnecessary, the boundaries being natural, and not to be mistaken.

That since the year 1846, the said Pedro C. Carrillo, Bezar
49 Simmons, and the petitioners have been, and the petitioners now are, in the quiet, peaceful, and undisputed possession of the said tract of land.

That they know of no conflicting claim.

That they rely for confirmation of title upon the original papers, copies of which are submitted herewith; upon the records and minutes in the archives now under the charge of the Surveyor General; and upon such other and further proofs as they may be advised are necessary.

Wherefore they pray the commissioners to confirm to them the said tract of land.

By their attorneys: HALLECK, PEACHY & BILLINGS.

Filed in office April 20th, 1852.

GEO. FISCHER, *Sec'y.*

Mr. DENIS. I offer in evidence a certified copy of the decree of confirmation by the District Court of the United States for the Southern District of California, at the December term, 1856, in case No. 237.

The document last referred to filed as Plaintiff's Exhibit No. 6, is in the words and figures following, to-wit:

In the District Court of the United States within and for the Southern District of California. Hon. Isaac S. K. Ogier, judge. December Term, 1856.

THE UNITED STATES, APPELEE,
vs.
FREDERICK BILLINGS & OTHERS, APPELLANTS. } No. 257.

Transcript from the board of land commissioners, No. 188.

This cause coming on to be heard on appeal from the decision of the board of land commissioners to ascertain and settle private land claims in California, upon the transcript
50 of the proceedings and decision of said board and the papers and evidence upon which said decision was founded, and also upon other evidence taken and filed in this court, and counsel for the respective parties having been heard, it is:

Ordered, adjudged, and decreed, that the decision of said board of land commissioners rejecting the claim of the appellants, Frederick Billings, and others be, and the same is hereby, reversed.

And it is further ordered, adjudged, and decreed that the title of the appellants, Frederick Billings and others, to the lands claimed by them, as set forth and described in their petition to the said board of commissioners, and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.

The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the "Island or peninsula of San Diego," is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the ranch of San Augustin Melijo, south by the sea, and west by the anchorage for ships, according to the documents of title and map to which reference is had; if the quantity within said boundaries is less than two square leagues, then the confirmation hereby made is for the whole tract, but if the quantity within said boundaries exceeds two square leagues, the the confirmation hereby made is made for two square leagues and no more.

ISAAC S. K. OGIER,
U. S. Dist. Judge for the S. Dist. of Cal.

(Endorsed:) Filed Jany. 12, 1857, C. Sims, Clerk.

51 Mr. DENIS. I will offer in evidence the order of substitution, merely as explanatory of the patent, substituting Peachy and Aspinwall for Billings and his associates as confirmees under the decree of confirmation.

The document last offered, filed as Plaintiff's Exhibit No. 9, is in the words and figures following, to wit:

Order substituting parties.

At a stated term of the United States District Court held at San Francisco on the seventh day of May, A. D. 1867.
Present, Hon. Ogden Hoffman, judge.

FREDERICK BILLINGS ET AL., ASSIGNEES OF BEZAR Simmons, dec'd., claimants & appellants, *vs.* THE UNITED STATES, APPELLEES.	No. —. Isla de San Diego.

Now at this day, on motion of counsel for claimants, and filing deeds of conveyance in support thereof showing title to the premises known as the island or peninsula of San Diego, claimed by and confirmed to the aforesaid claimants and appellees to be in Archibald C. Peachy and William H. Aspinwall, the said Peachy being the owner of the one undivided moiety and the said Aspinwall of the other undivided moiety.

Now, therefore, it is hereby ordered that the said Archibald C. Peachy and William H. Aspinwall be, and they are hereby, substituted in the place and lieu of Frederick Billings et al., assignees of Bezar Simmons herein, and that this cause be and the same is revived in the names of said Archibald C. Peachy and William H. Aspinwall, as claimants and confirmees herein, and that all further proceedings had herein be in their names.

OGDEN HOFFMAN, *Dist. Judge.*

(Endorsed:) Filed May 7, 1867. Geo. C. Gorham, clk., by John O. Wheeler, dep.

52 Mr. DENIS. I offer in evidence copy of the patent from the United States of America to Archibald C. Peachy and William H. Aspinwall, dated June 11, 1869. There is a map attached to it, but I haven't it. Counsel on the other side have it. Our stipulation, however, provides that the land described in the patent, with the exception mentioned, is the land in controversy here and the land also granted by the grant of May 15, 1846. Do you care to introduce this in evidence [exhibiting map]?

Mr. CLARK. Well, just for the sake of completeness, that is all.

The COURT. Is it a copy of the map that went with the patent?

Mr. DENIS. Yes.

The document last offered, together with the blue print map filed under same date and number, filed as plaintiff's Exhibit No. 8, is in the words and figures following, to-wit:

The United States of America, to all to whom these presents shall come, greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that, pursuant to the provisions of the act of Congress approved the third day of March, one thousand eight hundred and fifty-one, entitled "An act to ascertain and settle the private land claims in the State of California," Frederick Billings, James R. Bolton, and Henry W. Halleck, as claimants, filed their petition on the 20th day of April, 1852, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Fran-
53 cisco, in which petition they claimed the confirmation of their claim to a tract of land called the "island or peninsula of San Diego," containing two square leagues, more or less, in the county of San Diego and State aforesaid, said claim being founded on a Mexican grant to Pedro Carrillo, made on the 15th day of May, 1846, by Pio Pico, then constitutional governor of the department of California;

And whereas the board of land commissioners aforesaid, by a decree rendered October 31st, 1854, rejected said claim, which decree or decision was on appeal reversed by the District Court of the United States for the Southern District of California at its December term, 1856, in the cause entitled: "The United States, appellees, ads. Frederick Billings and others, appellants," the decision of said court being as follows: "It is ordered, adjudged, and decreed that the decision of said board of land commissioners rejecting the claim of the appellants, Frederick Billings and others, be, and the same is hereby, reversed.

"And it is further ordered, adjudged, and decreed that the title of the appellants, Frederick Billings and others, to the land claimed by them as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.

"The land of which confirmation is hereby made is in quantity two square leagues, and no more, is known by the name of the 'island or peninsula of San Diego,' is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego, towards the town, east by the end of the land of San Augustine Melijo, south by the sea, and west by the anchorage for ships,
54 according to the document of title and maps to which reference is had.

"If the quantity within said boundaries is less than two square leagues, then the confirmation hereby made is for the whole tract, but if the quantity within said boundaries exceed two square leagues, then the confirmation hereby made is made for two square leagues and no more," and appeal having been taken from said decree to the Supreme Court of the United States, said appeal was dismissed

at the December term, 1863, of said Supreme Court, as appears from a duly authenticated transcript on file in the General Land Office, whereupon the aforesaid district court, by a decree filed May 7th, 1867, ordered, "that said claimants be and they are hereby allowed to proceed under said decree of confirmation as under a final decree."

And whereas it further appears from a duly authenticated transcript on file in the General Land Office that at a stated term of the United States District Court held at San Francisco, on the 7th day of May, A. D. 1867, a decree was rendered in this case substituting Archibald C. Peachy and William H. Aspinwall in the place and lieu of Frederick Billings et als., and ordering that this cause be and the same is revived in the name of said Archibald C. Peachy and William H. Aspinwall as claimants and confirmees herein and that all further proceedings had herein be in their names";

And whereas, under the 13th section of said act of 3d March, 1851, and the supplemental legislation, and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the General Land Office a return with a plat of the survey of the said claim confirmed as aforesaid authenticated by the signature of the United States Surveyor General of the State of California, whereby it appears that said claim has been
55 designated as lot numbered thirty-seven in township eighteen south, of range three west, and lot numbered thirty-eight in township eighteen south, of range two west, of the San Bernardino meridian, containing four thousand one hundred and eighty-five acres and forty-six hundredths of an acre, situated in the State of California, the plat in the aforesaid return of survey being in the words and figures as follows, to wit:

(Plat inserted.)

56 Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of Congress aforesaid of 3d March, 1851, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said Archibald C. Peachy and William H. Aspinwall, and to their heirs, the tract of land embraced and described in the foregoing survey; but with the stipulation that in virtue of the 15th section of the said act, the confirmation of this said claim and this patent "shall not affect the interests of third persons."

To have and to hold the said tract, with the appurtenances, unto the said Archibald C. Peachy and William H. Aspinwall, and to their heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this eleventh day of June, in the year of our Lord one thousand eight hundred and

sixty-nine and of the Independence of the United States the ninety-third.

By the President,

U. S. GRANT,
By I. N. BURRITT, *Secretary.*

[UNITED STATES GENERAL LAND OFFICE SEAL.]

MARTIN BUELL,
Acting Recorder of the General Land Office ad interim.

Recorded vol. 7, pages 246 to 249, inclusive.

57 Received for record July 6th, A. D. 1869, at one o'clock and 30 min. p. m., and recorded July 26th, 1869, at 3 hr. p. m. at the request of E. W. Morse.

G. A. PENDLETON,
County Recorder,
By ED. HEUCK, *Deputy.*

(Endorsed:) No. E-34-Eq. U. S. A. *vs.* Coronado Beach Co. U. S. Exhibit No. 8. Filed 2nd Dec. 1919. Chas. N. Williams, clerk, by Ernest I. Morgan, deputy clerk. Blue-print map, filed under same date and number, is a part of this exhibit.

58 Mr. CLARK. Will you stipulate with us, Colonel Denis, that the United States in cause No. 257 took an appeal to the Supreme Court of the United States, and that that appeal was, on motion of the Attorney General of the United States, dismissed?

Mr. DENIS. Yes.

Mr. CLARK. And a mandate sent down by the Supreme Court of the United States to the District Court of the United States for the Southern District of California, and under that mandate the decision or decree in cause No. 257 was directed to be proceeded upon as a final decree.

Mr. DENIS. I do, because it is included in an offer I have already made—in two of the offers—one the decree of confirmation and the other the patent.

Mr. DUNNE. Did you offer the petition of the claimants in the District Court?

Mr. DENIS. Yes; that is, before the Land Commission.

Mr. DUNNE. And did you offer the answer of the Government in the United States District Court?

Mr. DENIS. No; but I have no objection to its going in.

Mr. DUNNE. And the petition on appeal?

The petition of claimants on appeal, and the answer of the United States thereto, were thereupon, at the suggestion of counsel for defendant, admitted and filed in evidence as Plaintiff's Exhibits 13 and 12, respectively, and the same are in the words and figures following, to-wit:

59 *Petition for review.*

No. 257.

In the District Court of the United States for the Southern District of California.

FREDERICK BILLINGS ET AL., ASSIGNEES OF Bezar Simmons,
vs.
THE UNITED STATES.
} Appeal by Claimants.

To the honorable the judge of the United States District Court for the Southern District of California:

The petition of Frederick Billings, James R. Bolton, and Henry W. Halleck, assignees of Bezar Simmons, and of Orin Simmons, Henry Simmons, Nathan P. Simmons, Benjamin F. Simmons, Priscilla Simmons, Ann S. Ryder, and Augusta S. Bartholomew, heirs at law of Bezar Simmons, deceased, respectfully represent that under the provisions of the act of Congress of 3d of March, 1851, a petition was presented to the commissioners appointed under said act to examine claims to land in California, praying for the confirmation of the claim of petitioners to the tract of land known as the island or peninsula of the port of San Diego; that said petition was accompanied by evidence of the title of said Bezar Simmons, and the other petitioners, to which for more particular information petitioners beg leave to refer; that the said claim was designated as No. 188, on the docket of said commissioners, and was rejected by them on the 31st day of October, 1854; that the said land is situated in the Southern Judicial District of California; that a transcript of the proceedings and decision of the commissioners was filed in the office of the clerk of the court for that district on the 2nd day of July, 1855; and that a notice of appeal on behalf
60 of the claimants was filed with said clerk on the said 2nd day of July, 1855.

Your petitioners pray for a rehearing of the case upon this appeal; that the said decision of the commissioners may be reversed and annulled and that the court will make such decree and order, as may be necessary and proper to confirm said claim to the premises mentioned and referred to in their said petition and evidences of claim.

And your petitioners will ever pray, &c., &c.

HALLECK, PEACHY & BILLINGS,
and STANLEY & KING,
Attys. for Petitioners.

LOS ANGELES, *Sept. 22nd, 1885.*

(Endorsed:) Filed Sept. 22nd, 1855. C. E. Carr, clerk, by John W. Ross, dep.

61 *Answer of U. S. Atty.*

In the District Court of the United States for the Southern District of California.

*N*on. Isaac S. K. Ogier, judge.

FREDERICK BILLINGS ET AL., ASSIGNEES OF BEZAR Simmons, appellants, *vs.* THE UNITED STATES, APPELLEE.	No. 257. Transcript No. 188.

The answer of Pacificus Ord, attorney of the United States for the Southern District of California, for and in behalf of the United States, to the petition of Frederick Billings, James R. Bolton, and Henry W. Halleck, assignees of Bezar Simmons and of Orrin Simmons, Henry Simmons, Nathan R. Simmons, Benjamin F. Simmons, Priscilla Simmons, Ann S. Ryder, and Augusta S. Bartholomew, heirs at law of Bezar Simmons, deceased, for a rehearing of this case, and that the decision of the commissioners appointed under the act of Congress of 3d March, 1851, to examine claims to land in California, be reversed and annulled, and their claim to the island or peninsula of the port of San Diego be confirmed, says: That he denies all and singular each and every allegation in said petition contained. And further this respondent denies generally the validity of the alleged title of the claimants to the said land claimed by them. And further this respondent denies that the said Billings, Bolton & Halleck are the assignees of said alleged heirs at law of said Simmons, deceased.

And the said respondent prays that this honorable court will affirm the decision of the said commissioners in said case, and decree the said alleged title for said land to be invalid, and for general relief.

P. ORD,
Attorney of the United States
for the Southern District of California.

(Endorsed:) Filed Jan'y 14th, 1856. C. E. Carr, clk.

62 Mr. CLARK. Will you stipulate with us, Colonel Denis, that the United States in cause No. 257 took an appeal to the Supreme Court of the United States, and that that appeal was, on motion of the Attorney General of the United States, dismissed, and a mandate sent down by the Supreme Court to the District Court of the United States for the Southern District of California, and under that mandate the decision or decree in cause No. 257 was directed to be proceeded upon as a final decree?

Mr. DENIS. I do, because it is included in an offer I have already made—in two of the offers—one the decree of confirmation and the other the patent.

The said mandate from the Supreme Court of the United States was thereupon, at the suggestion of counsel for defendant, admitted and filed in evidence as Plaintiff's Exhibit 14, and the same is in the words and figures following, to wit:

Mandate from the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the honorable the judge of the District Court of the United States for the Southern District of California, greeting:

[SEAL.]

Whereas lately in the District Court of the United States for the Southern District of California before you in a cause between Frederick Billings, James R. Bolton, & Henry W. Halleck, assignees of Bezar Simmons et al., appellants, and the United States, appellees (No. 257, for "The island or peninsula of San Diego"), wherein the decree was rendered in favor of the said appellants, as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in
63 such case made and provided, fully and at large appears; and whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-three, the said cause came on to be heard before said Supreme Court on the said transcript of the record, and on the motion of Mr. Attorney General Bates, of counsel for the appellants, it is now here ordered, adjudged, and decreed by this court that this cause be, and the same is hereby, dismissed, 12 Feb. You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-three.

Cost of ———.

Clerk, $———.

Attorney, $———.

Taxed by D. W. Middleton, clerk of the Supreme Court of the United States.

(Endorsed:) Filed May 7, 1867, Geo. C. Gorham, clerk, by John O. Wheeler, deputy.

64 It is stipulated that the foregoing be approved by the court under equity rule 75.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Solicitors for Plaintiff.

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Solicitors for Defendant.

Approved, July 19, 1920.
OSCAR A. TRIPPET,
Judge.

(Endorsed:) E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* Coronado Beach Company, a corporation, defendant. Statement of evidence to be included in transcript on appeal. Lodged Jul. 8, 1920. Chas. N. Williams, clerk. Settled statement of evidence filed July 19, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

65 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant.	No. E-34. Equity.

Notice of lodgment of statement of evidence on appeal.

To the Coronado Beach Company, a corporation, defendant above named, and to Messrs. Morrison, Dunne & Brobeck, Peter F. Dunne, Esq., Herbert W. Clark, Esq., R. G. Dilworth, Esq., and James E. Wadham, Esq., solicitors for said defendant:

Please take notice that on the 8th day of July, 1920, the plaintiff lodged with the clerk of the above entitled court its statement of evidence to be included in transcript on appeal; and that on the 19th day of July, 1920, said plaintiff and appellant will ask the court or judge to approve said statement of evidence.

Dated July 8th, 1920.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Solicitors for Plaintiff and Appellant.

66 Equity. No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Notice of Lodgment of statement of evidence on appeal. Filed Jul. 19, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

Received a copy of the within notice this 14th day of July, 1920.

MORRISON, DUNNE & BROBECK,
PETER F. DUNNE,
HERBERT W. CLARK,
R. G. DILLWORTH,
JAS. E. WADHAM,
Solicitors for the defendant, Coronado Beach Co.

67 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant.	No. E-34. Equity.

PETITION FOR APPEAL.

To the honorable court above entitled:

The United States of America, plaintiff in the above entitled action, considering itself aggrieved by the decree made and entered in the above entitled cause on the 15th day of March, 1920, and by the order of said court made and entered herein on the 1st day of June, 1920, denying plaintiff's motion to rescind, vacate, and set aside said decree; by which said decree the title of claimant and defendant was quieted and established in and to the land in said decree described, against any and all claims and demands whatsoever of plaintiff, the United States of America; said decree being, and being held by said court to be, a final determination of the rights of claimant and defendant in and to the said land, over and beyond any rights thereto in the United States, hereby appeals from said decree and said order to the Supreme Court of the United States, for the reasons specified in its assignment of errors filed herewith, and prays that its appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which such decree was made and entered, as aforesaid, duly authenticated, may be sent to the Supreme Court of the United States.

68

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Solicitors for Plaintiff and Appellant.

69 Equity. No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Petition for appeal. Filed Jul. 8, 1920, Chas. N. Williams, Clerk.

70 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. THE CORONADO BEACH COMPANY, A CORPORATION, claimant and defendant.	No. E-34. Equity.

Assignment of errors.

The United States of America, the plaintiff and appellant herein, having appealed, or being about to appeal, from that certain decree made in the District Court of the United States for the Southern District of California, Southern Division, on the 15th day of March, 1920, in an action pending in said court, in which the United States of America was plaintiff, and The Coronado Beach Company, a corporation, was claimant and defendant, and from the order of said court made and entered herein on the 1st day of June, 1920, denying plaintiff's motion to rescind, vacate, and set aside said decree; by which said decree the title of claimant and defendant, The Coronado Beach Company, in and to the land described in said decree, was quieted and established against any and all claims and demands whatsoever of plaintiff, the United States of America, the plaintiff says that in the records and proceedings in the said court in said action there are manifest errors, and presents the following as its assignment of errors upon the said appeal:

I.

The District Court of the United States for the Southern District of California erred in decreeing that the defendant, The Coronado Beach Company, is the exclusive owner in fee simple absolute, of the land described in said decree, and in quieting and establish-

71 lishing defendant's title thereto as against plaintiff, for the reason that the evidence before the court shows that plaintiff, the United States of America, is and was at all the times in said decree mentioned the owner of an easement and right to use said land for the defense or security of the Nation, and in connection therewith as permanent aviation stations for the Army and Navy and for aviation school purposes, which said easement, right, title, interest, and estate of plaintiff in and to said land is paramount to, and over and beyond, any right, title, interest, claim, or demand of said defendant therein or thereto.

II.

The said court erred in denying plaintiff's motion to rescind, vacate, and set aside said decree.

Wherefore the plaintiff prays that the said decree of this court made and entered on March 15th, 1920, be reversed, and the said court be directed to enter a decree ordering and adjudging that the plaintiff, the United States of America, is the owner of an easement and interest in and to the said land described in said decree, for use for the defense or security of the Nation, and in connection therewith, as sites for permanent aviation stations for the Army and Navy, and for aviation school purposes, and over and beyond any right, title, interest, claim, or demand of said defendant therein or thereto.

All of which is respectfully submitted.

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney,
Southern District of California,
Solicitors for Plaintiff and Appellant.

72 Equity. No. E–34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. The Coronado Beach Company, defendant. Assignment of errors. Filed Jul. 8, 1920. Chas. N. Williams, clerk.

73 In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT AND DEFENDANT.
} No. E–34. Equity.

Order allowing appeal.

In the above entitled suit, the plaintiff having filed its petition for an order allowing an appeal from the decree of this court made and entered in this suit on the 15th day of March, 1920, quieting and establishing the title of defendant in and to the land described in said decree against any and all claims and demands whatsoever of plaintiff, the United States of America, together with assignment of errors;

Now, on motion of Geo. J. Denis, Esq., solicitor for plaintiff, it is ordered that said appeal be, and hereby is, allowed to plaintiff to the Supreme Court of the United States from said decree.

It is further ordered that a certified transcript of the records and proceedings herein, in accordance with the statutes and the Equity Rules, be forthwith transmitted to said Supreme Court of the United States.

Dated July 8th, 1920.

OSCAR A. TRIPPET,
District Judge.

74 Equity No. E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Order allowing appeal. Filed Jul. 8, 1920. Chas. N. Williams, clerk.

75 United States of America, District Court of the United States, Southern District of California.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CORONADO BEACH COMPANY, A CORPORATION, CLAIMANT AND DEFENDANT.

Clerk's office. No. E-34. Equity. Praecipe.

To the clerk of said court:

SIR: Please issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Supreme Court of the United States, the said transcript to include the following:

Bill of complaint.
Answer.
Reply to answer.
Decree.
Opinion of the court.
Motion to rescind, vacate, and set aside said decree.
Opinion or order denying motion to rescind, vacate, and set aside decree.
Statement of evidence to be included in transcript on appeal.
Praecipe for transcript on appeal.
Notice of lodgment of statement of evidence to be included in transcript on appeal.
Petition for appeal.
Assignment of errors.
Order allowing appeal.

A. MITCHELL PALMER,
Attorney General of the United States,
GEO. J. DENIS,
Special Assistant to the Attorney General,
J. ROBERT O'CONNOR,
United States Attorney, Southern District of California,
Solicitors for Plaintiff and Appellant.

(Endorsed:) Received a copy of the within praecipe this 14th day of July, 1920. Morrison, Dunne & Brobeck, Peter F. Dunne, Herbert W. Clark, R. G. Dilworth, Jas. E. Wadham, solicitors for the defendant Coronado Beach Company.

E-34. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, *vs. The* Coronado Beach Company, defendant. Praecipe for transcript. Filed Jul. 19, 1920. Chas. N. Williams, clerk, by R. S. Zimmerman, deputy clerk.

In the District Court of the United States of America in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, vs. THE CORONADO BEACH COMPANY, A CORPORATION, defendant.	E-34. Equity.

Certificate of clerk of the United States District Court to transcript of record on appeal.

I, Chas. N. Williams, clerk of the District Court of the United States of America in and for the Southern District of California, do hereby certify the foregoing 76 typewritten pages, numbered from 1 to 76, inclusive, and comprised in one volume, to be a full, true, and correct copy of the bill of complaint; answer; reply to answer; decree; opinion of the court; motion to rescind, vacate, and set aside decree; order denying motion to rescind, vacate, and set aside decree; statement of evidence; notice of lodgment of statement of evidence; petition for appeal; assignment of errors; order allowing appeal; and praecipe for transcript on appeal; also the original citation on appeal, and the same together constitute the record in said cause as specified in the said praecipe filed in my office on behalf of the appellant by his attorneys of record.

In testimony whereof I have hereunto set my hand and affixed the seal of the District Court of the United States of America in and for the Southern District of California, Southern Division, on this 14th day of August, in the year of our Lord one thousand nine hundred and twenty, and of our independence the one hundred and forty-fifth.

[SEAL.] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America in and for the Southern District of California.
By R. S. ZIMMERMAN,
Deputy Clerk.

79 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, plaintiff, *vs.* THE CORONADO BEACH COMPANY, a corporation, claimant and defendant.	No. E–34. Equity. Stipulation.

It is herewith stipulated that a photographic copy of plat of the island or peninsula of San Diego, as surveyed under instructions from the U. S. Surveyor General by Henry Hancock, deputy surveyor, in June and July, 1867, and approved June 11th, 1869, by Jos. S. Wilson, Commissioner of the General Land Office, a photographic copy of which said plat is hereto attached and made a part of this stipulation, may be made a part of the record on appeal herein.

Dated September 21st, 1920.

A. MITCHELL PALMER,
Attorney General of the United States.
GEO. J. DENIS,
Special Assistant to the Attorney General.
J. ROBERT O'CONNOR,
United States Attorney,
Southern District of California,
Attorneys for Plaintiff.
MORRISON, DUNNE & BROBECK,
PETER F. DUNNE,
HERBERT W. CLARK,
READ G. DILWORTH,
JOS. S. WADHAM,
Attorneys for Defendant.

(For map above referred to see side page 198 of record on writ of error.)

80 Equity No. E–34. In the Supreme Court of the United States. United States of America, plaintiff, *vs.* The Coronado Beach Company, defendant. Stipulation. Office of the clerk, Supreme Court U. S. Received Sep. 29, 1920.

81 File No. 27882. Supreme Court U. S. October term, 1920. Term No. 525. The United States, pl'ff in error, *vs.* The Coronado Beach Company. Stipulation for addition to record. Filed Sept. 29, 1920.

(Indorsement on cover:) File No. 27882. S. California, D. C. U. S. Term No. 525. The United States of America, appellant, *vs.* Coronado Beach Company. Filed September 2d, 1920. File No. 27882.

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INDEX.

	Page.
STATEMENT	1
ASSIGNMENT OF ERRORS	6
ARGUMENT	7
I. The Mexican law and regulations	7
II. The United States as successor in interest of the Mexican Government has not been divested of the servitude or right to use the land for national defense	18
1. The decree of the United States District Court, confirming the Carrillo grant, does not affect the servitude on this land for use for national defense	19
2. The patent of the United States is merely confirmatory and does not release any rights of the United States	19
3. Laches will not run against the Government	21
4. The act of March 3, 1891, 26 Stat. 1095, 1099, has no application to lands other than public lands	21

CITATIONS.

Statutes.

Act of March 3, 1851, 9 Stat. 631	4
Act of March 3, 1891, 26 Stat. 1095	5, 19, 21
Act of July 27, 1917, 40 Stat. 247	1, 6, 18

Cases.

Arguello v. *United States*, 18 How. 539	8
Boquillas Cattle Co. v. *Curtis*, 213 U. S. 339	19
Brown v. *Brackett*, 21 Wall. 387	19
Eldridge v. *Trezevant*, 160 U. S. 452	17
Henshaw v. *Bissell*, 18 Wall. 255	19
La Roque v. *United States*, 239 U. S. 62	21
Los Angeles Milling Co. v. *Los Angeles*, 217 U. S. 217	17, 20
Northern Pac. Ry. Co. v. *United States*, 227 U. S. 355	21
Pueblo of Monterey, 6 L. D 179	14
Schell's Ex'r v. *Fauche*, 138 U. S. 562	16
United States v. *Beebe*, 127 U. S. 338	21
United States v. *Moore*, 95 U. S. 760	16
United States v. *New Orleans Pac. Ry. Co.*, 248 U. S. 507	21
United States v. *Whited & Wheless*, 246 U. S. 552	21

Miscellaneous.

Hall's Mexican Laws (ed. 1885) pp. 108, 133, 148	7, 10, 11
Jones' Rep., Sen. Doc. 18, 31st Cong., 2d sess., p. 27	14
Rockwell's Spanish and Mexican Law, p. 431	11, 12

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, *Appellant,* v. CORONADO BEACH COMPANY. | No. 525.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Congress by the Act of July 27, 1917, c. 42, 40 Stat. 247,[1] authorized the President to take pos-

[1] CHAP. 42. An act authorizing the President to take possession, on behalf of the United States, for use as sites for permanent aviation stations for the Army and Navy and for aviation school purposes, of the whole of North Island in the harbor of San Diego, California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to cause possession to be taken forthwith, on behalf of the United States, for use for national defense and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes, of the whole of North Island, in the harbor of San Diego, California, and the provisions of section three hundred and fifty-five, Revised Stat-

session forthwith for national defense and as sites for permanent aviation stations for the Army and Navy, of the whole of North Island in the harbor of San Diego, California, and the Attorney General or the claimants of North Island to make "application for the determination and appraisement of any rights private parties may have in the said island over and beyond any rights thereto in

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utes, shall not apply to the expenditure of any appropriations for improvements thereon for aviation purposes.

The Attorney General or the claimants to the said North Island are authorized to make application for the determination and appraisement of any rights private parties may have in the said island over and beyond any rights thereto in the United States to the District Court of the United States for the Southern District of California; the proceedings to be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use. Either party may take an appeal from the judgment of such court direct to the Supreme Court of the United States within ninety days after such judgment is rendered. Upon the final ascertainment of the value of any right, title or interest adjudged to be in any private claimants to the said island there shall be paid into court the value of the same as so determined, together with interest thereon at the rate of six per centum per annum from date possession thereof was taken as herein authorized; and thereupon the United States shall be vested with title to said lands. The amount so paid shall be distributed by order of the court to the owner or owners of such right, title, or interest in said island as their respective interests may be determined by the court. The amount necessary to pay the awards in favor of private claimants is hereby appropriated out of any money in the Treasury not otherwise specifically appropriated, to be disbursed under orders of the Secretary of War.

Approved, July 27, 1917.

the United States to the District Court of the United States for the southern district of California." The Act further provided that proceedings be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use, and for direct appeal to the Supreme Court of the United States within ninety days after the judgment was rendered.

In conformity with this law and by executive order of the President dated August 1, 1917, the United States took possession of the property (R. 5), and on August 7, 1919, the Attorney General filed a bill of complaint (R. 1) in the District Court of the United States for the southern district of California against the Coronado Beach Company, alleging that the United States "is the owner of an easement, estate, and interest in and to the tract of land * * * for use for the defense or security of the nation;" that it was in possession of the property and had been ever since the first day of August, 1917, for such purposes, but that defendant Coronado Beach Company, a corporation, claims to have, own or hold some right, title, estate, or interest in or to the tract of land adverse to or in conflict with plaintiff's easement, estate and interest therein, and that any such right, title, estate or interest of said defendant was subordinate to the interest of plaintiff in the use of the land for the defense or security of the nation, and that public interest and necessity require possession and use of the land permanently for purposes of national defense.

The prayer of the bill is that defendant be required to answer and assert the nature and extent of its claim, and that such claim be determined and adjudged to be subordinate to the easement, estate, or interest therein of the United States; that defendant be enjoined from claiming or asserting any right, title or interest in said land adverse to or in conflict with the rights of the United States; and that in the event the court shall find defendant has any right, title or interest in or to the land it shall cause the same to be appraised and the value thereof determined and adjudged, and upon payment to defendant of the said value, with interest thereon at six per cent per annum from the date of possession of the tract by the United States, that the court make and enter a proper decree condemning all such estate or interest of defendant in said tract of land, for public use for the defense or security of the nation.

Defendant company answered (R. 4) denying that the United States was the owner of any interest in the land described, alleging that the value of the property sought to be condemned amounted to $7,500,000; that under the Act of March 3, 1851, c. 41, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California," and acts amendatory thereof, the grant of this land had been confirmed by the Board of Commissioners on Private Land Claims in California and by the District Court of the United States for the southern district of California; that in accordance with the final decree entered therein patent for the

land had been issued, and that said decree confirming title to said land was a bar to any claim by the United States of any interest therein for any purpose whatsoever. The answer further sets up the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, as a statutory bar to any claim by the United States of any interest in the land.

The case was heard upon a stipulation of facts. R. 25. From this stipulation it appears that on May 15, 1846, Pio Pico, then Governor of California, made a grant to one Carrillo, a Mexican citizen, of the land known as or named "Isla" or peninsula in the port of San Diego, California, and that the land now known as North Island was included in the grant.

In the Mexican grant (R. 28) the Governor declared that he had granted to Carrillo "the aforesaid land in decree of this day, declaring to him the ownership of it by these presents, in conformity with the law of August 18, 1824, and the regulations of November 21, 1828, subject to the approval of the most excellent departmental assembly," under certain conditions, one of which was that the grantee could inclose the land, but not to the prejudice of the crossings, roads and servitudes.

Carrillo conveyed all his rights under the grant to one Simmons (R. 29), and it is conceded that whatever title or interest was held by Simmons became vested by mesne conveyances in the Coronado Beach Company.

The court entered a decree (R. 15) that defendant Coronado Beach Company was, at the time of the commencement of the suit, and now is, the sole and

exclusive owner in fee simple absolute of all lands described, free and clear of any easement, estate, interest, right, title, claim or demand of any kind of the United States for use for the defense or security of the nation, or for any purpose whatsoever, and that title of defendant company in and to the land described, and every part and parcel thereof, be quieted and established against any and all claims or demands whatsoever of the United States.

An appeal from this decree directed to this court as provided for in the Act of July 27, 1917, brings the case before this court.

ASSIGNMENT OF ERRORS.

(R. 40.)

1. Error in decreeing that the Coronado Beach Company is the owner in fee simple absolute of the land described in the decree, and in quieting and establishing its title thereto, because at all times the United States was the owner of an easement and right to use said land for the defense or security of the nation.

2. Error in denying plaintiff's motion to rescind, vacate, and set aside said decree.

Under this assignment of errors appellant presents the following propositions:

(1) *The lands granted to Carrillo by the Governor of the department of California, "in conformity with the law of August 18, 1824," were subject to perpetual servitude for use for purposes of national defense;* and (2) *The United States as successor in interest to the Mexican government has not been divested of this servitude.*

ARGUMENT.

I.

The Mexican Law and Regulations.

For convenient reference we have printed the law of August 18, 1824, and the regulations of November 21, 1828, under the authority of and in conformity with which this grant or donation was made, as an appendix to this brief.

The decree of August 18, 1824, is sections 488 to 502, inclusive, in Hall's Mexican Laws, page 148; the Rules and Regulations of November 21, 1828, are sections 503 to 520, inclusive.

The first provision of the law is the promise to foreigners of security to persons and property. The second provision, §489, is as follows:

> *National Lands.*—2. The objects of this law are those national lands which are neither private property nor belong to any corporation or town (pueblo), and can therefore be colonized.

The fourth and fifth articles are as follows:

> *Lands Exempt.*—4. Those territories comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the sea coast, can not be colonized without the previous approval of the supreme general executive power.
>
> *Land for Public Use.*—5. If for the defense or security of the nation the federal government should find it expedient to make use of any portion of *these* lands for the purpose of

> constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general congress, or during its recess with that of the government council.

The regulations authorize the governors of the territories "to grant vacant lands in their respective territories to such contractors (impresarios), families, or private persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating and inhabiting them," and provides that persons soliciting lands shall file a petition, describing as distinctly as possible, by means of a map, the lands asked for. The regulations further provide that grants shall be made in exact conformity with the laws on the subject, and especially with the law of August 18, 1824.

This law of August 18, 1824, and the regulations made in conformity therewith, were analyzed by this court in its opinion in *Arguello* v. *United States*, 18 How. 539. In that case it was contended that a grant of lands within twenty leagues of the boundaries of a foreign nation and within ten leagues of the seacoast, to a Mexican citizen, was void under the fourth article (§491), of this law unless approved by the supreme general executive power of Mexico. The court denied this proposition and held that §4, prohibiting colonization within twenty leagues of the boundaries of a foreign nation or within ten leagues of the seacoast, was intended to apply only to foreigners who colonized lands in Mexico and had no application to Mexican citizens.

Without analyzing the provisions of the fifth article of the law (§492), the court stated generally in its opinion in that case that the first eight sections of this law apply solely to foreigners. No argument is entered into limiting the fifth article to the lands of foreigners, and the question of whether the Mexican federal government reserved the right to use any portion of its national lands for the purposes of defense or security of the nation was not before the court for determination, and there was no special reason for the court to analyze this in its decision.

By the third article the Mexican *States* were authorized to enact laws for the colonization of their respective demarcation in conformity with this law, but the Act provides for the distribution of vacant land in the *territories* both to foreigners and Mexican citizens. The latter are given preference in their distribution, but no other distinction is made among the citizens except such as is due to private merit, service to the country, or inequality of circumstances.

The first question for consideration therefore, is, whether the language of the fifth article (which provides that if the national federal government shall find it expedient to make use of any portion of *these* lands for the purpose of national defense, it may do so), applies to all of the national lands to be distributed under this law or only to the national lands to be colonized by foreigners.

No good reason can be perceived why the general government should not reserve the right to use lands donated to its citizens equally with those donated to

foreigners who colonize them, for the purposes of national security or defense if the emergency should arise. Indeed, when it is considered that the citizens could be granted lands by the act of the governor of the territory alone on the national boundaries or on the seacoast, and without any supervision by the central government, there is more reason for applying the provisions of the fifth article to the lands of citizens than to those donated to foreigners for colonization purposes, the latter being forbidden to settle within twenty leagues of the national boundaries or ten leagues of the seacoast without the approval of the supreme general executive power.

The power of the national government to take lands in the states for national defense is found in the law of April 6, 1830 (Hall's Mexican Laws, p. 108), which provides that the general government shall credit the value of these lands on the debt due by the state to the federation.

It is interesting to note that in obedience to article 3 of the law of 1824, which directed the congress of the states of the Mexican federation to form laws and regulations for colonization for their respective demarcation in conformity with said act, the congress of the state of Coahuila and Texas on March 25, 1825, eight months after the passage of the law of August 18, 1824, adopted a colonization law, the seventh article of which provides that the government should take care that no lands should be settled upon, whether by Mexicans or foreigners,

except such as merit the approbation of the supreme government, Hall's Mexican Laws, p. 133, §417.

As being the construction of executive officers clothed with the duty of executing the laws governing the territory of California, the attention of the court is respectfully called to the report of Captain H. W. Halleck, then Secretary of State of the Territory of California, to the Military Governor of California, under date of March 1, 1849, found in Rockwell's Spanish and Mexican Law, commencing at page 431. This report purports to be, *inter alia*, "on the titles of lands in California, which may be required for fortifications, arsenals, or other military structures, for the use of the general government of the United States." At page 433 is found this language:

> But, without the previous approval of the supreme government, no territorial governor could make grants of land within ten leagues of the seacoast, nor within twenty leagues of the boundaries of any foreign power. Moreover, the general government reserved to itself the right to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices which it might deem expedient for the defense or security of the nation.

And it would further appear that this restriction or reservation of the law of 1824 was recognized by the territorial legislature, for the report says (page 433):

> The restriction contained in paragraph 4 of the decree of August 18, 1824, is also fully

> recognized in the proceedings of the territorial legislature. For example: In the instructions of the territorial junta to the deputy from Upper California to the general congress of Mexico, dated July 25, 1836 (paragraph 4), it is expressly conceded that the general government of Mexico alone had power to dispose of islands on the coast of California, and (paragraph 19) the deputy is directed to solicit from the general government an absolute confirmation of the grants of land made in California under the colonization decree of August 18, 1824, and the regulations of November 21, 1828, releasing the proprietors from the restrictions contained in these laws and regulations.

And on page 435 of the same volume the author of the report speaks of onerous conditions imposed on holders of land titles in California, presumbably referring to the reservation claimed by the Government as in the instant case.

This reservation of the use for national defense in article 5 of the law of 1824 applied to all lands granted under the colonization law to missions and pueblos, as well as to individuals, and that this was the view taken as early as 1847 would seem to be indicated by the incident referred to by Captain Halleck, in the following language (page 437):

> Soon after General Kearney became governor of this country, representations were made to him that it was important to the growth and prosperity of the town of San Francisco that the general government of the

> United States should immediately designate what land within the limits of that town was required for its use (as pointed out in article 5th of the colonization law of August 18, 1824), the town being permitted to dispose of the remainder as municipal lands. General Kearney acting in the double capacity of civil governor of California and legal representative of the United States, made a decree dated March 10, 1847, directing the selection of such land as was required for government purposes, and surrendering on the part of the United States, all claim to the remainder within certain defined limits.

The action of General Kearney as Governor of the Territory of California and as local representative of the United States, directing by decree of March 10, 1847, the selection of such land in San Francisco as was required for governmental purposes, and surrendering on the part of the United States all claim to the remainder, was a practical construction of article 5 of the colonization law of August 18, 1824, by the officer in charge with the duty of executing it. As said in the report of the Secretary of State (page 437):

> This decree of General Kearney can hardly be regarded as an ordinary *land grant* made by a territorial governor; it was rather the act of an agent of the supreme executive power of the general government, designating the lands required for the purposes contemplated in article 5 of the law of August 18, 1824, and releasing the remaining lands

> within such limits from the action of the general reservation contained in that article.

It will be remembered that by this action General Kearney selected lands within the limits of the pueblo grant to San Francisco, which are now in the Presidio at that place. See Jones' Rep., Sen. Doc. No. 18, 31st Cong., 2d sess., p. 27.

The Secretary of the Interior in *Pueblo of Monterey*, 6 L. D. 179, decided October 4, 1887, considered the effect of §5 of the law of 1824 in relation to the military reservation and public buildings erected within the limits of the pueblo grant to the town of Monterey, and in holding that this reservation and the lands upon which these public buildings stood were not included in the grant to the pueblo, said (p. 182):

> After the independence of Mexico, the constituent Congress, on August 18, 1824, passed a decree relating to the colonization of the territories of the republic and the granting of lands therein; regulations under this decree were issued November 21, 1828. Under these laws and regulations the governors of the territories were authorized to make grants of vacant lands, but those for colonies and towns were not to be valid until approved by the supreme government; and if within ten leagues of the coast a similar approval was required as to all grants, public or private. *By clause five of said decree, the general government reserved to itself the right to make use of any portions of the granted lands for the purpose of constructing warehouses, arsenals, or other public edifices which it might deem*

expedient for the welfare or security of the nation. Again, on April 6, 1830, the same Congress enacted that "The executive may take such lands as it considers useful for fortifications or arsenals * * * indemnifying the states for the value thereof out of the amounts due by them to the federation."

In brief, it may be said that under the laws of Mexico in force in California, at the time of the acquisition of the latter country, the pueblos or towns were entitled, for their benefit and that of their inhabitants, to the use of the lands constituting the site of the town and adjoining it within the prescribed limits; and such lands could be disposed of by the municipal authorities in *solares* or building lots; or retained for common use, except such portions as were required by the general government for warehouses, arsenals, or other public edifices needed for national purposes. *Grisar* v. *McDowell*, 6 Wall. 363.

In a further discussion the Secretary said (p. 185):

Nor can there be any question that, prior to the conquest, under the laws, the Mexican authorities could at any time have taken possession and made reservation for national purposes of lands embraced in the pueblo grant. To this right of Mexico and all others the United States succeeded, first by conquest in 1846, and then by treaty in 1848; and, in continuous assertion of a right to this property for military purposes, in 1847 Captain Warner, by command of his superior officer, made survey of and staked off the lines of the military reservation.

This contemporaneous construction of the Governor of the Territory and of its Secretary of State, and the decision of the Secretary of the Interior, are entitled to most respectful consideration. *United States* v. *Moore*, 95 U. S. 760. See also *Schell's Executors* v. *Fauché*, 138 U. S. 562.

From the foregoing it is submitted that the language of this section of the law of 1824 applies to all lands colonized thereunder. This being true, we next inquire as to the character or extent of the power reserved by the Mexican government. The interpretation put upon this article by the Governor of the Territory and the Secretary of State, if the report of the Secretary of State can be credited, was also the interpretation of the territorial junta of Upper California, for its instructions to the deputy to the general congress of Mexico, dated July 25, 1836, as shown above, directed the deputy to solicit from the general government an absolute confirmation of the grants in California under the colonization decree of 1824 and the regulations of 1828, "releasing the proprietors from the restrictions contained in these laws and regulations."

The extent and nature of this right rest upon the same principle found in Spanish and French law under which lands abutting on rivers and bayous are subject to a servitude in favor of the public whereby such portions thereof as are necessary for the purposes of making and repairing public levees, may be taken, in pursuance of law, without

compensation. *Eldridge* v. *Trezevant*, 160 U. S. 452, 463. It will be noted in this connection that the Mexican patent, issued in exact conformity with the law of 1824, specifically provided that the grantee might inclose the land but without prejudice to the crossings, roads and *servitudes*. It is therefore respectfully submitted that servitudes were explicitly recognized as existing upon these lands in the patent to them, and that these servitudes are not only the riparian servitudes, the right to take them for levees, or the right to use their shores and banks for purposes of navigation, commerce and fishery, but the clearly paramount servitude declared in article 5 of the law, to use them, in pursuance of law, for the defense and security of the nation.

In *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217, the Milling Company insisted that it had an unassailable title to a tract of land through which flowed the waters of a non-navigable stream, and in consequence of its patent it was a riparian owner, clothed with full rights as such to the use of the waters running through the land as part and parcel of its estate. The city of Los Angeles, successor to the pueblo of Los Angeles which had a confirmed claim to four square leagues of land, contended that although the confirmation did not in terms embrace the right to full use of the stream to its source for municipal purposes, such right was a well recognized incident annexed to pueblo grants. The Supreme Court of California sustained the claim of the city, although the effect of it was to burden all

the proprietors above the stream with a servitude in favor of the city. This court declined to review the judgment, holding that it was one of local law. It is well to note that the Supreme Court of California did not confine the servitude existing in favor of the city to the pueblo as it originally existed, but extended it to include the same rights in the annexed districts of the city.

Thus it is seen that servitudes for the common good were well recognized under the Mexican laws.

It is submitted that the United States, upon the acquisition of California, while assuming obligations under the law of nations and the treaty of Guadalupe Hidalgo to protect the property rights of the citizens of the territory, at the same time succeeded to all the rights which had been reserved to the Mexican government to use the national lands donated under the law of 1824 for national defense when its congress should find it expedient to do so.

Congress asserted the necessity for this island for national defense in the Act of July 27, 1917, and directed that possession be taken forthwith of the whole of North Island for such purpose, and in the language of the Act the rights of the general government are recognized.

II.

The United States as successor in interest of the Mexican government has not been divested of the servitude or right to use the land for national defense.

It is contended (1), that the decree of the United States District Court for the southern district of

California confirming the Carrillo grant to Billings and his associates, is conclusive that there is no reservation of any right or interest in this land; (2), that the patent issued by the United States divests the United States of any such reserve right; (3), that the government is guilty of laches in not earlier asserting its right, and (4), that this suit was barred by the statute of limitations, Act of March 3, 1891, 26 Stat. 1095, 1099.

1. *The decree of the United States District Court, confirming the Carillo grant, does not affect the servitude on this land for use for national defense.*

The decree of confirmation is limited to the establishment of the validity of the claim as it then existed and did not change the character of the grant. *Brown* v. *Brackett*, 21 Wall. 387; *Henshaw* v. *Bissell*, 18 Wall. 255, 264. The action of the United States in dealing with parties claiming under Mexican grants was a confirmation of the rights of the claimants rather than a quitclaim or release of the interests of the United States, *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344.

2. *The patent of the United States is merely confirmatory and does not release any rights of the United States.*

In *Boquillas Cattle Company* v. *Curtis*, *supra*, page 344, it was said that:

> It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the

> grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be issued, says that it shall be issued "to the confirmee."

In *Los Angeles Milling Co.* v. *Los Angeles, supra*, it was said (page 227):

> This court, speaking by Mr. Justice Miller, tersely disposes of the nature of such old Mexican titles in *Adam* v. *Norris*, 103 U. S. 591, 593:
>
> "But the United States in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a quitclaim—an admission that the rightful ownership had never been in the United States but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases are *Beard* v. *Federy*, 3 Wall. 478; *Henshaw* v. *Bissell*, 18 Wall. 255; *Miller* v. *Dale*, 93 U. S. 473."
>
> It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than a quitclaim. *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339, 344.

3. Laches will not run against the Government.

When the United States sues to enforce a public right or to protect the public interest, the defense of laches is not available. *United States* v. *New Orleans Pac. Ry. Co.*, 248 U. S. 507, 518; see also *United States* v. *Beebe*, 127 U. S. 338.

4. The Act of March 3, 1891, 26 Stat. 1095, 1099, has no application to lands other than public lands.

The contention that appellee can avail itself of the statute of limitations provided by the Act of March 3, 1891, is without merit, as is settled by *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 367; *La Roque* v. *United States*, 239 U. S. 62, 68; *United States* v. *Whited & Wheless*, 246 U. S. 552, 561.

CONCLUSION.

The decree of the District Court that the United States has no servitude, right, title or interest in or to the lands in the bill of complaint described as the whole of North Island, is erroneous and should be reversed.

Respectfully submitted.

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CHARLES S. LAWRENCE,
Attorney.

FEBRUARY, 1921.

APPENDIX.

Decree of the 18th August, 1824, Respecting Colonization.

The sovereign general constituent Congress of the United Mexican States has been pleased to decree—

1st. The Mexican nation promises to those foreigners who may come to establish themselves in its territory security in their persons and property, provided they subject themselves to the laws of the country.

2d. The objects of this law are those national lands which are neither private property nor belong to any corporation or pueblo, and can therefore be colonized.

3d. To this end the Congress of the States will form, as soon as possible, the laws and regulations of colonization of their respective demarcation, with entire conformity to the constitutive act, the general constitution, and the rules established in this law.

4th. Those territories comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the seacoast, can not be colonized without the previous approval of the supreme general executive power.

5th. If, for the defence or security of the nation, the federal government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general Congress, or during its recess with that of the government council.

6th. Before the expiration of four years after the publication of this law, no tax or duty (direcho) shall be imposed on the entry of the persons of foreigners, who come to establish themselves for the first time in the nation.

7th. Previous to the year 1840, the general Congress can not prohibit the entry of foreigners to colonize, except compelled to do so, with respect to the individuals of some nation, by powerful reasons.

8th. The government, without prejudicing the object of this law, will take the precautionary measures which it may consider necessary for the security of the federation, with respect to the foreigners who may come to colonize. In the distribution of lands, Mexican citizens are to be attended to in preference; and no distinction shall be made amongst these, except such only as is due to private merit and services rendered to the country, or inequality of circumstances, residence in the place to which the lands distributed belong.

10th. Military persons who are entitled to lands by the promise made on the 27th of March, 1821, shall be attended to in the States, on producing the diplomas granted to them to that effect by the supreme executive power.

11th. If by the decrees of capitulation, according to the probabilities of life, the supreme executive should see fit to alienate any portion of land in favor of any military or civil officers of the federation, it may so dispose of the vacant lands of the territories.

12th. No one person shall be allowed to obtain the ownership of more than one league square, of five thousand varas (5,000 v.), of irrigable land (de regadio), four superficial ones of land dependent on

the seasons (de temporal), and six superficial ones for the purpose of rearing cattle (de abreradiso).

13th. The new colonists can not transfer their possessions in mortmain (manos muertas).

14th. This law guarantees the contracts which the grantees (empressarios) may make with the families which they may bring out at their expense; provided they are not contrary to the laws.

15th. No one who, by virtue of this law, shall acquire the ownership of lands, shall retain them if he shall reside out of the territory of the Republic.

16th. The Government in conformity with the principles established in this law, will proceed to the colonization of the territories of the Republic.

General Rules and Regulations for the Colonization of Territories of the Republic.—Mexico, November 21, 1828.

It being stipulated in the 15th article of the general law of colonization of the 18th of August, 1824, that the Government, in conformity with the principles established in said law, shall proceed to the colonization of the territories of the Republic; and it being very desirable, in order to give to said article the most punctual and exact fulfillment, to dictate some general rules for facilitating its execution in such cases as may occur, his excellency has seen fit to determine on the following articles:

1st. The governors (gefes politicos) of the territories are authorized (in compliance with the law of the general Congress of the 18th of August, 1824, and under the conditions hereafter specified) to grant vacant lands in their respective territories to such contractors (empressarios), families, or private persons, whether Mexicans or foreigners, who may ask

for them, for the purpose of cultivating and inhabiting them.

2d. Every person soliciting lands, whether he be an empressario, head of a family, or private person, shall address to the governor of the respective territory a petition, expressing his name, country, profession, the number, description, religion, and other circumstances of the families or persons with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the land asked for.

3d. The governor shall proceed immediately to obtain the necessary information whether the petition embraces the requisite conditions required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to; or if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant or not.

4th. This being done, the governor shall accede or not to such petition, in exact conformity to the laws on the subject, and especially to the before mentioned one of the 18th of August, 1824.

5th. The grants made to families or private persons shall not be held to be definitely valid without the previous consent of the territorial deputation, to which end the respective documents (espedientes) shall be forwarded to it.

6th. When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision.

7th. The grants made to empressarios for them to colonize with many families shall not be held to be definitely valid until the approval of the supreme

government be obtained; to which the necessary documents must be forwarded, along with the report of the territorial deputation.

8th. The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given.

9th. The necessary record shall be kept in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded quarterly to the supreme government.

10th. No capitulization shall be admitted for a new town except the capitulizator bind himself to present as colonists twelve families at least.

11th. The governor shall designate to the new colonists a proportionate time within which he shall be bound to cultivate or occupy the land on the terms and with the number of persons or families which he may have capitulized for, it being understood that if he does not comply, the grant of the land shall remain void; nevertheless, the governor may revalidate it in proportion to the part which the party may have fulfilled.

12th. Every new colonist, after having cultivated or occupied the land agreeable to his capitulization, will take care to prove the same before the municipal authority, in order that, the necessary record being made, he may consolidate and secure his right of ownership, so that he may dispose freely thereof.

13th. The reunion of many families into one town shall follow, in its formation, interior government, and policy, the rules established by the existing laws for

the other towns of the republic, special care being taken that the new ones are built with all possible regularity.

14th. The minimum of irrigable land to be given to one person for colonization shall be 200 varas square; the minimum of land called de temporal shall be 800 varas square, and the minimum for breeding cattle (de obsevadeso) shall be 1,200 varas square.

15th. The land given for a house lot shall be 100 varas.

16th. The spaces which may remain between the colonized lands may be distributed among the adjoining proprietors who shall have cultivated theirs with the most application and have not received the whole extent of land allowed by the law, or to the children of said proprietors, who may ask for them to combine the possessions of their families; but on this subject particular attention must be paid to the morality and industries of the parties.

17th. In those territories where there are missions the lands occupied by them can not be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1930

No. 525

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CORONADO BEACH COMPANY,
Defendant.

Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

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Subject Index.

	Pages
STATEMENT OF THE CASE	1 - 14
1. The property described	3 - 8
2. Defendant's title originated on May 15, 1846, in a grant by the Government of Mexico to Pedro C. Carrillo, under the Colonization Law of August 18, 1824, and the Regulations of November 11, 1828	8 - 11
3. Plaintiff's claim of easement—its nature and consequences	11 - 14
(a) Title of Carrillo's successors confirmed January 12, 1857, by U. S. District Court	11, 12
(b) Appeal of U. S. Government from decree of confirmation dismissed	12
(c) United States patent issued to Carrillo's successors, June 11, 1869	12
I. THE GRANT TO CARRILLO IS NOT SUBJECT TO AN EASEMENT OF OCCUPANCY FOR MILITARY AND NAVAL PURPOSES	14 - 53
1. Easement defined	14, 15
2. Colonization Law of August 18, 1824	15 - 28
(a) It reserved no easement to the Mexican Federal Government. Its objects were the ungranted public lands—the proprietary lands—of the Mexican Nation	18 - 28
3. Regulations of November 11, 1828	28 - 43
(a) They, like the Colonization Law of August 18, 1824, affect the vacant and unoccupied public land	30 - 43
4. Cases as to riparian rights explained and distinguished; shown to rest on local law; inapplicability pointed out	48 - 53

Pages

II. THE DECREE OF CONFIRMATION AND THE RESULTING PATENT ASCERTAINED AND SETTLED THE TITLE OF RESPONDENT CONCLUSIVELY BETWEEN THE UNITED STATES AND RESPONDENT ..... 53 - 90

1. Act of March 3, 1851,—to ascertain and settle private land claims in California,—the jurisdiction thereby conferred upon the Board, the Courts, and in sequel, upon the Department of the Interior in respect to the survey and patent ..... 53 - 56

(a) The object of the Act was to prevent just such a controversy as is now pending in the case at bar by separating and distinguishing the public domain from that which had become, under the Mexican Government, private property ..... 56 - 59

(b) The "validity of the claim", as determined under the Act of March 3, 1851, includes a determination of the "legal operation" of the grant, and of "what the effect of the law of Mexico was", and of "every question which could arise on the title claimed" ..... 59 - 75

(c) The patent to the successors of Carrillo is conclusive, until vacated, as against the United States ..... 65 - 75

(d) The reservation of plaintiff's alleged easement should have been embodied in the decree and patent—illustrations ..... 75 - 90

III. IN NO EVENT, UNDER THE ACT OF MARCH 3, 1891 (26 Stat. 1095, 1099), CAN THE PLAINTIFF GO BEHIND THE PATENT ..... 90 - 97

List of Cases Referred To.

Pages in Brief

Arguello v. U. S., 18 How. 539.....4, 9, 10

Barker v. Harvey, 180 U. S. 72.....70, 71, 72, 73
Barker v. Harvey, 181 U. S. p. 499..... 48
Beard v. Federy, 3 Wall. 478.....65, 67, 71
Botiller v. Dominguez, 130 U. S. p. 252.....57, 58, 59
Boquillas Cattle Co. v. Curtis, 213 U. S. 342.....51, 52, 53
Butte City Water Co. v. Baker, 196 U. S. 119, 127 13

Camou v. U. S., 171 U. S. 277, 279..... 35, 36
Chambers v. Fisk, 22 Tex. pp. 521-2, 527, 528-9, 530-531 37
Charles River Bridge v. Warren Bridge, 11 Pet. 419, 641 31
C. B. & O. R. v. Chicago, 166 U. S. pp. 235-6..... 33
City of Los Angeles v. Los Angeles F. & M. Co., 152 Cal. 645 (217 U. S. 217).....48, 49, 50, 77

Domat, Civil Law, Par. 974..... 34

Eldridge v. Trezevant, 160 U. S. 452.....46, 47, 48

Fremont v. U. S., 17 How. 541.....29, 34, 55, 57, 59

Goode v. McQueen's Heirs, 3 Tex. 241, 251..... 18
Grisar v. McDowell, 6 Wall. 363.....82, 83, 84

Hall's Mexican Law..... 16
Hardin v. Jordan, 140 U. S. 371..... 50
Harvey v. Barker, 126 Cal. 262.....44, 56, 68, 69
Harvey v. Barker, 181 U. S. 481.....45, 46, 75, 76, 90
Hayes v. U. S., 170 U. S. p. 643..... 18

Jones on Easements, Section 422..... 34

Knight v. Land Association, 142 U. S. p. 200..... 13

La Roque v. U. S., 239 U. S. 62.....93, 94, 95
Light v. U. S., 220 U. S. 523..... 91
Los Angeles F. & M. Co. v. Thompson, 117 Cal. 594 .....62, 63, 64, 65
Los Angeles F. & M. Co. v. Thompson, 180 U. S. 72.. .....65, 66, 67, 68

Pages in Brief

Los Angeles Terminal Co. v. S. P. R. R. Co., 136 Cal. 36 15
Lynch v. Bernal, 9 Wall. 315.....61, 62, 80, 81, 82

Mitchell v. U. S., 9 Pet. 711.....78, 79, 80
Mitchell v. U. S., 15 Pet. 52..... 60

Northern Pacific Ry. Co. v. U. S., 227 U. S. 355..... 93

Phillips v. Mound City Association, 124 U. S. 605.... 73-75
Pollard's Lessee v. Hagan, 3 How. 212, 225..... 34
Pumpelly v. Green Bay Co., 13 Wall. 166, 182..... 32, 89

Republic v. Thorn, 3 Tex. 499..... 26, 37
Rodriguez v. U. S., 1 Wall. 582, 588..... 54

Salem Co. v. Stayton, 33 Fed. 146, 154..... 34

U. S. v. Arredondo, 6 Pet. 691, 733..... 24
U. S. v. Chandler-Dunbar Co., 209 U. S. 447..... 91, 92
U. S. v. Coe, 170 U. S. 681, 690..... 35
U. S. v. Cruz Cervantes, 18 How. 553, 555 *ad fin*..... 22
U. S. v. Elder, 177 U. S. p. 116..... 56, 59
U. S. v. Fossatt, 21 How. 445, 448..... 59
U. S. v. Osio, 23 How. 273..... 77, 78
U. S. v. Reading, 18 How. 1..... 25, 29
U. S. v. Ritchie, 17 How. 524.....12, 44, 54
U. S. v. Santa Fe, 165 U. S. 675.....85, 86, 87, 88
U. S. v. Turner, 11 How. p. 667..... 55, 59
U. S. v. Vallejo, 1 Black 541..... 16, 28
U. S. v. Vigil, 13 Wall. 449..... 16, 35
U. S. v. Whited, 246 U. S. 560..... 95, 96
U. S. v. Workman, 1 Wall. 705.....16, 30, 61
U. S. v. Yorba, 1 Wall. 412.....11, 13, 26

Wagner v. Hanna, 38 Cal. 116..... 15, 34

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 525

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
CORONADO BEACH COMPANY,
Defendant.

Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

Statement.

The case proceeds under the Act of July 27, 1917, c. 42, 40 Stat. 247. The Act of Congress authorized the President

> "to cause possession to be taken forthwith on behalf of the United States, for use for national

> defense, and, in connection therewith, as sites for permanent aviation stations for the army and navy and for aviation school purposes, of the whole of North Island, in the Harbor of San Diego, California".

Accordingly, on August 1, 1917, the date fixed by the pleadings (Tr. pp. 2, 5), the government took over the occupancy of this land, and has maintained the occupancy ever since.

The statute has a double aspect: One, as for the "determination of any rights" in North Island, whether of the claimants thereto, or of the United States; the other, as for the "appraisement of any rights private parties may have". Jurisdiction is committed "to the District Court of the United States for the Southern District of California, the proceedings to be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use". The appellate jurisdiction is lodged in this court, by way of direct appeal from the judgment of the District Court, within ninety days after such judgment was rendered.

The question, then, of the title, and, next, the question of the value of the land as appraised in sequence, are the things to be seized. The pending controversy, as presented on the record, divides into a bill of complaint on the part of the United States, to quiet its title to the property, as by way of an alleged easement of occupancy for military and naval purposes; and into a supplemental inquiry

before a jury, into the value of the land. Upon the question of title, the transcript of the record in this court is designated No. 525; and upon the supplemental inquiry the transcript is designated No. 524. This brief pertains to transcript No. 525, and goes to the question of title. That question was resolved by the court below in favor of this respondent, to the full extent of the fee simple title. In due course, the value of the land was appraised by a jury. By an appeal from the determination of this respondent's exclusive title, and by writ of error as to the appraisement, it is sought to bring the controversy here.

The Act of Congress refers to the lands in question as "the whole of North Island, in the Harbor of San Diego, California". The complaint avers that

> "said tract of land is situated in the County of San Diego, State of California, and is known, designated, and described as the whole of North Island in the Harbor of San Diego, California" (Tr. p. 2).

And that said tract "is known, designated and described as the whole of North Island", is admitted by the answer (Tr. p. 5). It is set forth in the answer that the petition for confirmation, under the Act of March 3, 1851, filed on April 20, 1852, by the predecessors in interest of this respondent, designates the land as "the Island or *Peninsula* of San Diego" (Tr. p. 6); and that the decree of confirmation is of the land "known by the name of the Island or Peninsula of San Diego" (Tr. p. 8). In

referring to the decree confirming the title, the answer speaks of it as "confirming the title to the said island or peninsula of San Diego" (Tr. p. 10); and plaintiff, in its replication, refers to the title and the land in the same terms (Tr. p. 14).

The petition of Pedro C. Carrillo, the original grantee, was offered by counsel for plaintiff, at the hearing below, as "being the petition of Pedro C. Carrillo to the Governor of California, asking for a grant of the Island or Peninsula in the Port of San Diego" (Tr. p. 26). In this petition, the land is described as

> "a vacant land in the limits of this port, in the southern part, known by the name of 'la Ysla' or Peninsula which the Port of San Diego forms";

and the boundaries are given, three of which are by water, and one by land (Tr. p. 26). In the "informe", or report to the Governor as to the status of the applicant, and the condition of the land (Arguello v. U. S., 18 How. 539, 541), the place is referred to as "La Ysla", or Peninsula (Tr. p. 27). In the preliminary order of the Governor "acceding" to the request of the applicant (Arguello v. U. S., 18 How., p. 543), Carrillo is declared "owner in fee of the land known or named 'Isla' or Peninsula in the Port of San Diego, towards the part of the anchorage" (Tr. p. 27); and the corresponding title is directed to be issued (Aguello v. U. S., 18 How., p. 543). And in the grant itself, which closes the record or expediente, the premises are referred

to as "the Island or Peninsula in the Port of San Diego", and the boundaries are stated, three of which are by water and one by land (Tr. p. 28).

In the petition filed under the Act of March 3, 1851, asking confirmation of the grant, the land is designated as

> "the Island or Peninsula of San Diego, situate in the present county of San Diego, containing two square leagues, with the boundaries described in the grant, a copy of which is submitted" (Tr. p. 29).

The decree of confirmation refers to the land as "known by the name of the 'Island or Peninsula of San Diego'," and gives the boundaries, three of which are by water and one by land (Tr. p. 30).

In the mandate from the Supreme Court of the United States, dismissing, at the instance of the Attorney General, the appeal from the decree of confirmation made by the District Court, and remanding the cause for final proceedings therein, the language used is—"the Island or Peninsula of San Diego" (Tr. p. 37).

In the United States patent of June 11, 1869, the reference is

> "to a tract of land called the 'Island or Peninsula of San Diego', containing two square leagues, more or less, in the County of San Diego and State aforesaid, said claim being founded on a Mexican grant to Pedro Carrillo, made on the 15th day of May, 1846, by Pio Pico, then Constitutional Governor of the Department of California".

The boundaries stated in the decree of confirmation are set forth, three by water, one by land. The patent recites that

> "there has been deposited in the General Land Office a return with a plat of the survey of the said claim confirmed as aforesaid, authenticated by the signature of the United States Surveyor General of the State of California."

This plat is inserted in and made part of the patent (Tr. pp. 32-3).

A photographic copy "of plat of the Island or Peninsula of San Diego", is stipulated to be part of the record on appeal herein (Tr. p. 44). The statement follows:

> "For map above referred to see side page 198 of Record on Writ of Error" (Tr. p. 44).

This plat is authenticated by the signature of the United States Surveyor General for California; and bears the approval, as of June 11, 1869, of the Commissioner of the General Land Office. It is designated, on its face, as follows:

> "Plat of the Island or Peninsula of San Diego, finally confirmed to Archibald C. Peachy and William H. Aspinwall, surveyed under instructions from the U. S. Surveyor general by Henry Hancock, Deputy Surveyor, June and July, 1867, containing 4,185.46 acres."

For convenient reference, we have attached, as a frontispiece to this brief and to the brief in No. 524, in reduced form, a replica of the delineations of the plat which accompanies the patent. It will be seen, carrying in mind the boundaries of the original

grant, that the land in question is composed of a relatively long "pan-handle", proceeding from the main land and expanding into what have been popularly known as Coronado and North Island. It is along this pan-handle that the San Diego and Arizona Railway proceeds from the City of San Diego into Coronado, and from Coronado, across Spanish Bight, by bridge, into North Island. It will also be seen, from the record in No. 524, and will be more particularly referred to in the brief pertaining to that transcript, that during the construction of the United State Breakwater at the southern extremity of North Island, communication by railroad, in the movement of materials, was by tracks laid on the firm land between Coronado and North Island, and intervening between the south line of Spanish Bight upon the north, and the high water mark of the Pacific Ocean on the south. The granted land is, therefore, a peninsula—not an island, but almost an island; and a glance at the expansions of the Peninsula into Coronado—sometimes called South Island —and North Island, will make it easy to understand how, in popular speech, and even in legal papers, the granted land is designated as the Island or Peninsula of San Diego. The boundaries, set forth in the original grant, will now be understood graphically: on the north by the Bay of San Diego "towards the town"; on the south by the sea—Pacific Ocean; on the west by the Bay or anchorage of ships, now defined by the United States Survey and grant line; and on the east, where the pan-handle begins, by the main land.

It will appear from the plat of the survey, accompanying the patent, and from the reproduced map attached to this brief, that North Island, so called, is a part of the Peninsula, confirmed to Billings and others by the decree of the District Court of the United States, made final by the dismissal, at the instance of the Attorney General, of the government's appeal, and patented by the United States to Peachy and Aspinwall, from whom this respondent deraigns title. It was stipulated below, that the premises described in the complaint, that is to say, North Island, "are included within and are a part of the land described" in the decree of confirmation, and in the patent (Tr. p. 25). It was also stipulated that this respondent has succeeded to, and is now the owner of, the right, title and interest of the confirmees in the decree, and of the patentees in the patent (Tr. p. 25). It is this land, known as "the whole of North Island", that the plaintiff, on the allegation of an "easement" of perpetual occupancy, would, in effect, expropriate, and without a dollar of compensation, from this respondent, a bona fide purchaser, for value, through meane conveyances, from the original grantee.

The grant here was made under the Mexican laws of colonization and settlement—that is to say, the law of August 18, 1824, applicable to the states of the Mexican federation, as they were then constituted, and the regulations of November 11, 1828, promulgated by the Chief Executive of Mexico, under authority of the law of 1824, and applicable to the

territories, in distinction from states, of the Mexican Republic. These laws and regulations for the colonization and settlement of the public domain, had to do with the public, vacant lands of the country. The policy was to invite and encourage colonization and settlement of these vacant lands. This contemplated the introduction, in numbers, of foreign colonists; and, as well, the settlement of Mexican citizens on the land. Hence, the grants to impresarios or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers; and hence, the distribution of lands to Mexican citizens, families or single persons (Arguello v. U. S., 18 How. 539, 547).

Grants to foreign colonists, however, were made with circumspection. The establishment of foreigners, in a considerable body, on the frontiers of the nation, or near the seacoast, might be fraught with danger to the security of the republic. Mexico had but recently achieved its successful revolt from Spain. The new independence might be menaced, at the seacoast, by the power of Spain. The frontiers, on the other hand, were in adjacency to the great republic of the north. The Mexican littoral and the Mexican border, should be secured against unfriendly or dubious occupation. It was, therefore, provided that colonization grants to foreigners, within twenty leagues of the border, or ten leagues of the seacoast, should first have the consent of the supreme executive power. No such condition was imposed in the case of a settlement

grant to a Mexican citizen (Arguello v. U. S., 18 How., pp. 547-8). That consent, however, once obtained, the foreign colonists would be in by a title as indefeasible as that of a Mexican grantee.

It is beyond doubting that the administration of the colonization and settlement law of 1824, was, in the first instance, committed to the several states of the federation—certainly, until the adoption of the Centralist Constitution of 1836, when the states were superseded by departments, under departmental governors appointed by the central authority. The power to grant the public vacant lands within their limits, in colonization and settlement, was vested by the law of 1824, in the states. A limitation upon state authority to make such grants, was imposed, as to foreign colonists, in the case of lands within the border and littoral leagues —the previous approbation of the General Executive was first required. That limitation respected, the state was free to administer the public vacant lands, within its limits, and to grant them as well to foreign colonists as to Mexican settlers. The lands in question, comprehended and dealt with by this law, are the public vacant lands. And it is further provided in the law of 1824, that the authority of the state to subject these vacant lands to a grant, whether to a foreigner or to a native, may be anticipated by the intervention of the general government, if, in the judgment of the federal government, it should be deemed necessary to use any portion of these public lands for the construction of ware-

houses, arsenals or other public edifices. In short, for these public purposes, and in advance of any translation of the public domain into private ownership, the federal government, in priority to the state, had the first call on the vacant lands.

But the contention of the plaintiff in the case at bar, and the strain put upon it by its allegation, goes beyond this. It is not proposed here to vindicate the right of the general government, whether in a state or in a territory, to subject unoccupied and ungranted public lands to the military and naval uses of the nation, in advance of any disposition thereof by local authority. The bald proposition is, that, after the public vacant land, unqualified by any action or disposition of the general government, has been granted by competent local authority to a settler in good faith, relying upon the promise and invitation written on the front of the law, and after the land has ceased to be vacant, and ceased to be public, none the less the general government may step in, and turn the settler out without compensation or redress, and occupy the land indefinitely and wholly. The proposition is startling, it is without precedent, and it involves portentous consequences.

On May 15, 1846 (U. S. v. Yorba, 1 Wall., pp. 422-3), the grant in question was made to Carrillo (Tr. p. 28). That was 75 years ago. On the 20th of October following, Carrillo conveyed to Simmons, and on September 3, 1850, Simmons conveyed to the petitioners under the Act of March 3, 1851 (Tr. p. 29). On January 12, 1857, in the United States

District Court for the Southern District of California, on appeal from the Board of Land Commissioners, and in a proceeding tantamount to the institution of a suit *de novo* (U. S. v. Ritchie, 17 How., 524, 533), the grant was confirmed, without reservation or exception (Tr. p. 30), and thereafter, on motion of the Attorney General of the United States, the government's appeal from the decree of confirmation was dismissed, and the cause remanded, with leave to the petitioners to proceed upon the decree of the District Court as under a final decree (Tr. p. 37). The patent was issued to Peachy and Aspinwall, the substituted plaintiffs, on June 11, 1869—the final patent and final record of the United States (Tr. pp. 32-4). We are dealing here with a grant 75 years old, and with a patent of the United States issued over half a century ago.

In 1824 and in 1828, Texas—the State of Coahuila and Texas—was a state of the Mexican federation. It was a frontier or border state. The Mexican territory of New Mexico, comprising our own states of New Mexico and Arizona, was border land. The Mexican territory of California, now our own State of California, had a littoral of more than a thousand miles. If the extraordinary and strained contention of the government, in this case, is to be sustained, thousands upon thousands of acres of land within the twenty border leagues, or within the ten littoral leagues, in the State of Texas, in the State of New Mexico, in the State of Ari-

zona, and in the State of California, are clouded and imperiled in its title. The result would be, in the language of Mr. Justice Field (Knight v. Land Assn., 142 U. S., p. 200), a "frightful unsettlement of titles". Of the claim put forward on the part of the government here, it may be said, as was said from a different point of view, in the communication from the American Secretary of State, on March 18, 1848, to the Mexican Minister of Foreign Relations, quoted in the argument for the United States in U. S. v. Yorba, 1 Wall., at p. 118:

> "These Mexican grants (referring to certain grants which had lapsed into desuetude anterior to the treaty of Guadalupe Hidalgo) it is understood covered nearly the whole of the seacoast, and a large portion of the interior of Texas. They embraced thriving villages, and a great number of cultivated farms, the proprietors of which have acquired them honestly by purchase from the state of Texas. These proprietors are now dwelling in peace and security. To revive dead titles, and suffer the inhabitants of Texas to be ejected under them from their possessions, would be an act of flagrant injustice, if not wanton cruelty. Fortunately, this government possesses no power to adopt such a proceeding. The same observations equally apply to such grantees in New Mexico and Upper California."

And in Butte City Water Co. v. Baker, 196 U. S. 119, 127, it is said by this court:

> "Finally it must be observed that this legislation was enacted by Congress more than thirty years ago. It has been acted upon as valid through all the mining regions of the country. Property rights have been built up on the faith of it. To now strike it down would

unsettle countless titles and work manifold injury to the great mining interests of the far west. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast—interests which have been built up on the faith not merely of congressional action, but also of judicial decisions of many state courts sustaining it, and of a frequent recognition of its validity by this court."

I.

THE GRANT TO CARRILLO WAS NOT SUBJECT TO THE ALLEGED EASEMENT OF OCCUPANCY FOR MILITARY AND NAVAL PURPOSES.

The allegation of the complaint is (Tr. p. 2)

> "That the plaintiff is the owner of an *easement,* estate, and interest in and to the tract of land hereinafter described, *for use* for the defense or security of the nation, and, in connection therewith, as sites for *permanent* aviation stations for the army and navy and for aviation school purposes."

It is further said that since August 1, 1917, plaintiff has been "in the possession, *occupancy and use* thereof *for the purposes* above mentioned".

An easement of permanent, indefinite occupancy and use—that is the category to which plaintiff's alleged interest is assigned.

> "An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use

> out of or over the estate of another" (Los Angeles Terminal Co. v. S. P. R. R. Co., 136 Cal. 36, 48).

The easement here is not claimed by a grant from Carrillo, or his successors in interest, to the plaintiff. It is claimed as a reservation. It is in the nature of a military and naval reservation. Of course, the difference is only of circumstance between the reservation of an easement by the grantor, and the subsequent transfer of an easement by the grantee.

> "A reservation of an easement in the deed by which the lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the land" (Wagner v. Hanna, 38 Cal., p. 116).

It is said, in terms, by plaintiff, in its replication in this case:

> "That the land described in the complaint was granted to one Pedro Carrillo by the then Governor of California, Pio Pico, on May 15th, 1846;
>
> "And that said grant was so made by said governor pursuant to, under the conditions of, and subject to the provisions of, the Act of the Mexican Congress of August 18th, 1824, and the rules and regulations of said Congress of November 21st, 1828, and *particularly* under the provisions of *Article 5* of said Act of *August 18th, 1824*, and Article 8 of said Act of November 21st, 1828" (Tr. p. 13).

Strictly speaking, the regulations of November 21, 1828, were not "regulations of said Congress".

They were executive regulations, promulgated by the government under authority derived from the fifteenth article or section of the law of August 18, 1824, an act of the Mexican Congress, and were meant to apply to the territories in distinction from the states. The fifteenth article of the law of 1824 reads:

> "The government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic" (Hall's Mexican Law, p. 149).

And in the preamble to the regulations of 1828, it is recited:

> "It being stipulated in the fifteenth article of the General Law of Colonization of the 18th of August, 1824, that the *government,* in conformity with the principles established in said law, shall proceed to the colonization of the territories of the republic, and it being very desirable, in order to give to said article the most punctual and exact fulfillment, to *dictate some general rules* for facilitating its execution in such cases as may occur, *his Excellency has seen fit to determine* on the following articles" (Hall, p. 150) (U. S. v. Vallejo, 1 Black, pp. 551, 552; U. S. v. Workman, 1 Wall., p. 762; U. S. v. Vigil, 13 Wall., pp. 450, 453).

Article 8 of the regulations of 1828, mentioned in plaintiff's replication, provides for a statement in the grant,

> "that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given" (Hall, p. 151).

It is from Article 5 of the laws of 1824, that plaintiff would spell out this far-fetched easement in land

neither public nor vacant, separated from the public domain by grant of competent authority, and resting in private ownership. This is the article dealing with public vacant lands within the limits of the states, under which, in advance of the exercise by the state of its dispositive power in the premises, the general government, for defensive purposes, is given a first call upon the occupancy and use of "these lands". It reads:

> Art. 5. "If for the defense or security of the nation, the *federal* government should find it expedient to make use of any portion of *these* lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so with the approbation of the general congress, or during its recess, with that of the government council" (Hall, p. 148).

Laws of August 18th, 1824, for the colonization and settlement of public vacant lands within the states.

The laws of 1824 were passed under a federal regime. They went upon a recognition of the states, as such,—of their relative independence and autonomy in matters of internal polity. Mexico had successfully revolted from Spain. Iturbide's brief candle of imperialism was soon snuffed out. On January 31, 1824, the constitutive act, a fundamental scheme of organic bases, recognizing the states of the federation, was adopted by the provisional, representative assembly, known as the Constituent Congress. Under this act, the general constituent congress was elected. It proceeded, in full recognition of the political status of the states, to pass

the law of August 18, 1824; and again, on October 24, 1824, in like recognition of the status and relative autonomy of the states, it adopted the permanent constitution of October 24, 1824 (Hayes v. U. S., 170 U. S. p. 643).

As expressed by the Supreme Court of Texas at the December term of 1848 (Goode v. McQueen's Heirs, 3 Tex, 241, 251):

> "The federal party, having gained the ascendency and overthrown centralism, were laying down the programme of a federal republic composed of the several different states, and each of these states to be independent of the federal government so far as related to their internal polity; the federal government to be charged with peace or war, and everything connected with foreign relations and intercourse with other nations."

The first article of the law of 1824 pledges "to those foreigners who may come to establish themselves in the territory, security in their persons and property"; and the second article makes it plain that the public lands—not lands which have passed into private property, and to the security of which the first article pledges the faith of the nation—are the things dealt with.

> "The objects of this law," says the second article, "are *those national lands* which are neither *priate property* nor belong to any corporation or town (pueblo), and *can therefore* be colonized."

The potential capacity of the public lands, in distinction from private holdings,—of "those national

lands" which are not private property,—for purposes of colonization, is here brought out.

Next comes article three, by which, in consonance with the federal idea, the power to make laws for the colonization of the public lands within the limits of the states, is vested in the legislatures of the several states. This article reads:

> "*To this end,* the Congress *of the states* will form, as soon as possible, the laws and regulation of colonization of their respective demarcations, with entire conformity to the constitutive act, the general constitution, and the rules established in this law."

Two limitations, however, are imposed on the power of the state. That power is limited, as to the public lands within twenty leagues of the limits of any foreign nation, or within ten leagues of the seacoast, by the requirement that the previous approbation of the general executive must first be had; and again by the authority retained in the federal executive to subject "these lands" to occupancy and use for defensive purposes. The first limitation is in article four. It reads:

> "Those territories (obviously used in the sense of lands, and so translated in White's Recopilacion Vol. 1, p. 160) comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the seacoast, cannot be colonized without the previous approval of the supreme executive power."

The second limitation is in article five. It reads:

> "If, for the defense or security of the nation, the federal government should find it expedient

> to make use of any portion of *these lands* for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general congress, or, during its recess, with that of the government council." and (Hall, p. 148, White, Vol. 1, p. 160)

Article six exonerates foreign colonists, for a period of four years, from any capitation tax; Article seven, somewhat anomalous in the view that one legislature may not curtail the faculties of a succeeding legislature, provides that the federal legislature itself cannot prohibit the entry of foreign colonists, "except compelled to do so with respect to the individuals of some nations, by powerful reasons;" and by way of added circumspection, it is said in section eight, that the government, "without prejudicing the object of this law, will take such precautionary measures as may be necessary for the general security, in respect to foreigners who come to colonize." It is further provided in section eight, according to Hall's distribution of the sections,—a separate and ninth section in White's distribution—bringing the law, now, to bear upon Mexican citizens as such:

> "In the distribution of lands, Mexican citizens are to be attended to in preference; and no distinction shall be made amongst these, except such only as is due to private merit and services rendered to the country, or, in equality of circumstances (under equal circumstances, White), residents in the place to which the lands distributed belong."

Article ten relates to the disposition of public lands by the general government, in aid of military or civil officers of the federation, and again brings it out that the power of the general executive, under this law, when put forth on the indicated occasions, is exercised on the vacant, ungranted lands,—on this particular occasion, in respect to the vacant lands, not of the states, but of the territories. It reads:

> "If, by the decree of capitulation, according to the probabilities of life, the supreme executive should see fit to alienate any portion of land in favor of any military or civil officers of the federation, it may so dispose of the *vacant* lands of the territories."

Article eleven fixes the maximum allotment to any one person—one square league of irrigable land; four, of seasonal (Hall) or arable (White) land; and six, for raising cattle (Hall), or grazing land (White),—eleven square leagues in all.

Article twelve inhibits transfers by the new colonists "in mortmain;" article thirteen guarantees the contracts "which the impresarios may make with the families which they bring out at their expense," provided they are otherwise lawful; and article fourteen imposes upon the colonist or settler, the requirement of residence within the republic.

Finally, article fifteen (in Hall's distribution; sixteen in White's distribution) provides:

> "The government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic."

(1) The grant to Carrillo was not a grant to an impresario, "bringing out" a body of foreign colonists. It was not a grant to a foreign colonist. It was a grant to a native Mexican citizen and resident (Tr. p. 26). Such a grant, made to an individual, and to a Mexican citizen, is to be distinguished from grants of land "made the subject of colonization" (U. S. v. Cruz Cervantes 18 How., 553, 555, ad fin.)

> "It is evident" said this court in the Arguello case (Arguello v. U. S., 18 How. p. 547) "from an inspection of this act of 1824 and consequent regulations of 1828, that they contemplate two distinct species of grants: 1. Grants to impresarios, or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers; 2. The distribution of lands to Mexican citizens, 'families or single persons'."

In the Arguello case, it was held by this court that the first eight sections of the law of 1824, "apply wholly to colonists and foreigners."

> "The ninth section," it is said, "first speaks of the distribution of lands to individuals and families, as distinguished from colonists, and provides that Mexican citizens should be preferred, without distinction of classes, except as to those who have rendered special service to their country."

The court goes on:

> "Thus we have seen that the first eight sections apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them, to the subject introduced for the first time

in the ninth section, or to select the fourth section as applicable to native citizens, while the other seven are confined by their terms to foreigners."

And again:

"The regulations of 1828, made for the purpose of carrying into execution the law of 1824, evidently give this construction to that act. It makes a clear distinction between impresario contracts for colonization, and grants to Mexican citizens. In conformity with the fourth section of that act, it requires grants to impresarios to have the sanction of the supreme government, while those made to individuals or families need only the approval of the territorial deputation. (As to territorial deputation, and the equity of a grant even without its approval, see U. S. v. Reading, 18 How., pp. 7-8). This may be said to be a legislative construction of the act of 1824, and demonstrates that this restraint of grants within the littoral leagues had no application except to colonies of foreigners" (18 How., pp. 548-9).

The total exclusion, then, of any colony of foreigners, from the border or littoral leagues, within the limits of the state, was competent, in the first instance, to the general government.

"It would also seem," said the district judge in the court below (Tr. p. 21), "that the Mexican government could, with as much propriety, have made a distinction between a Mexican citizen and a foreigner concerning the right of occupancy, as provided in article five, as to have made the distinction in article four".

(2) But, again: The alleged easement of occupancy, under article five of the law of 1824, is

attributable to the *public* lands, to the vacant lands of the nation; it is not related to lands upon which the state has already exercised its dispositive power, and which have passed, as a fact accomplished, into the vested right of private ownership.

> "Whatever the legislative power may be," this court has said, "its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property, to which they may be fairly applicable, and not particularly applied by the legislature, no silent implied and constructive repeals, ought ever to be understood as to divest a vested right." (U. S. v. Arredondo, 6 Peters 691, 733.)

The law of 1824 was designed to attract settlement, population, and cultivation to the vacant land of Mexico. It was an invitation, not to the native citizen alone, but to the foreigner as well. It pledged the faith of the nation to the vested rights of the settlers. In its opening article it promised to the strangers who came within its gates, "security in their persons and property". It declared, in the second article, that "the objects of this law are those *national lands* which are neither private property nor belong to any corporation or town". In the sixth article it expressed its policy and favor by exempting foreigners from any head tax, for four years after the enactment of the law. And in article seven, the federal legislature went the anomalous length of assuming to bind succeeding legisla-

tures "not to prohibit the entry of foreigners to colonize," unless compelled, on occasion, "by powerful reasons".

> "It is enough to say (U. S. v. Reading, 18 How., p. 8) that the Mexican republic, from the time of its emancipation from Spain, always dealt most liberally with foreigners in its anxiety to colonize its vacant lands. It invited them to settle upon her territory by promises of protection of them and their property. And by the first article of the decree of 1828 for colonizing her vacant lands, foreigners were included with those to whom the governors of the territories might make grants of land for the purpose of cultivating and inhabiting them."

Article four was a limitation upon the power of the respective states to grant public land within the border or littoral leagues, "without the previous approval of the supreme executive power"; and article five, in immediate sequence, limits the power of the respective states by the authority reserved to the general government to subject "*these* lands" to occupancy and use for defensive purposes. "These lands", the lands this law was dealing with, are the pubile lands, the vacant lands; they are not the lands which have been translated, by appropriate action, into the vested right of private ownership. The foreigner, it is true, at the frontier or on the seacoast, required action ulterior to the authority of the state. His grant needed the previous approbation of the federal executive. But that approbation once given, the state was authorized to com-

municate to him a title as perfect, a right as firmly vested, as any inhering in a native Mexican citizen. If the federal government would establish a military reservation, an arsenal or a fortification, the vacant ungranted lands of the state were open to its occupancy. In the territories it was supreme and exclusive,—there was no interposing state. It is not to be endured, in any reasonable system of legislation, that the colonist or the settler, invited and importuned to make a home for himself and his family on the vacant land of the country, can be turned out, on the instant, at the policy or whim of the general government, without compensation or redress.

> "The *object* of the general colonization law of 1824 and the regulations of 1828, which were adopted to carry that law into effect, was the *settlement* of the *vacant* lands of the republic." (U. S. v. Yorba, 1 Wall. 412, 423.)

And in the twelfth article of the regulations of 1828, it is said in terms (Hall, p. 151):

> "Every new colonist, after having cultivated or occupied the land agreeably to his capitulation, will take care *to prove the same* before the municipal authorities, in order that the necessary record being made, he may consolidate and secure his *right of ownership,* so that *he may dispose freely thereof.*"

At the December term of 1848, in the case of Republic v. Thorn, 3 Tex. 499, 505, the Supreme Court of Texas, dealing with the validity "of a claim to land within the twenty border leagues", arising

under a Mexican grant of May 5, 1834, took occasion to say:

> "By this law (of August 18, 1824), all the *vacant* lands of the nation were declared subject to colonization, and the *states* were authorized to form colonization laws or regulations for their respective states, in conformity with the constitutive act, the general constitution, and the regulations of the national colonization law. The *power of disposing* of the *public* lands, or of appropriating *any portion* of *them* to the *uses* and *purposes* of the *federal* government, *except so much as might be necessary* for the erection of warehouses, was relinquished and ceded to the states—the general government, for colonization purposes, retaining control only over such lands as lay within the territories of the republic."

If the federal government "should find it expedient to make use of any portion of *these* lands" (article five, law of 1824) for an arsenal or a warehouse, it was within its competency, to anticipate the action of the state, and appropriate the land for that purpose; or to anticipate the grant of a territorial governor, and thereby forestall his authority to grant the land into private ownership. Judge Hoffman illustrates this historically in the case of Palmer v. United States, 1 Hoffman 249, 269. He says:

> "The fifth article of the law of 1824 provides that the government of the federation may make use of any portion of the lands *of the nation,* to construct warehouses, arsenals, etc., it may deem expedient, with the consent of congress. It is to be presumed, therefore, that the appropriation and occupation must *have*

> *been* made by the government of the federation. Until, then, the federal government determined *to abandon them,* no governor of a department would be at liberty to treat their sites as *vacant public* land, because, through accident, neglect, or the disturbed condition of public affairs, their garrisons might have been withdrawn, or the fortifications in some degree dismantled. The fort or castle occupied a position unmistakably indicated by nature as the site of a defensive work for this harbor. It had been selected as such, perhaps, by the Spanish conquerors, and the United States has since, at the same point, erected the most extensive fortifications on this coast. It is not conceivable that, under a general power to distribute *vacant* lands to actual settlers, it could have been intended to clothe the governor with discretionary power to give to a private individual a spot so necessary to the national defense, *which had long been used for the purpose,* and on which *the cannon of the nation still remained.*"

Regulations of November 21, 1828.

These regulations are summarized in U. S. v. Vallejo, 1 Black 541, 551-2. The supreme executive government, it is said, acting under the sixteenth section (White's distribution) of the law of 1824,

> "on the 21st November, 1828, established regulations for the granting and colonization of the *public* lands in the *territories,* and, among others, in California".

The territorial governors "are hereby authorized to grant *vacant* lands within their respective territories", to either Mexicans or foreigners who may petition for them, with the object of cultivation or settlement,—the said grants to be made "according

to the laws of the general congress of 18th August, 1824, and under their qualifications".

> "Then follows a series of preliminary proceedings, specially enjoined for the purpose of ascertaining the fitness of the petitioner to receive a grant, and also of ascertaining if the land asked for may be granted *without prejudice to the public* or individuals; and it is declared, in view of these, the governor will grant or not the land; but if the grant is made, it must be in strict conformity with the laws upon the subject, and specially with reference to the law of 1824; and the grants made to individuals or families shall not be definitively valid without the previous consent of the departmental assembly." (Such consent, however, was not necessary to be shown, as a prerequisite to confirmation under the act of March 3, 1851: U. S. v. Reading, 18 How. 1, 7-8; Fremont v. U. S., 17 How. 541, 562.)

This court, in the Vallejo case, after noting section eight of the regulations, providing for the patent or title, signed by the governor, and section nine, providing for its recordation, goes on to remark:

> "There are many other stringent provisions and conditions imposed which it is not important to refer to specially; it is sufficient to say, that the *system* thus established by the sovereign power of the nation for the grant and distribution of the *public* lands, exhibits a deliberation and care over the subject that is in striking contrast with the system of granting the public lands under our government, and furnishes the highest evidence of the extreme interest the Mexican government took in guarding against impositions and frauds by or upon the political chiefs in the execution of the law."

Article seven of these regulations makes a distinction between grants to impresarios, upon the one hand, and grants to Mexican families or individuals, on the other. The impresario grant, "to colonize the many families", to be definitely valid, must await the approval of the supreme government. Article twelve has already been noted,—providing, after occupancy and cultivation, for the proof and record thereof before the municipal authorities, to the end that the colonist "may consolidate and secure his *right of ownership* so that he may *dispose freely thereof*". Article thirteen provides for "the reunion of many families into one town," the "interior government" of which shall be assimilated to that of the existing towns of the republic; and it is provided in section fifteen, that house lots shall be assigned—"the land given for a house shall be one hundred varas". "Is it conceivable", to borrow Judge Hoffman's expression in the Palmer case, supra, that the title of the householder, in a town originating in a Mexican grant of land within the border or littoral leagues, can be displaced, after whatever tract of time, by the "easement" put forward here? The laws of 1824, and the regulations of 1828, were not meant to confiscate vested rights in granted and occupied land. They bore upon the vacant and unoccupied public land. As this court said in U. S. v. Workman, 1 Wall. 745, 761, an original and direct proceeding under the act of March 3, 1851:

"Ample authority was conferred upon the governor of California to grant *vacant* lands belonging to the supreme government. Such authority was derived from the colonization law of the 18th of August, 1824, and the regulations of the 21st of November, 1828, as has been affirmed by repeated decisions of this court. But all of those decisions proceed upon the ground that the authority conferred is *limited* and *restricted* to the granting of *unoccupied public* land. Grants under those laws were required to be made subject to the approval of the departmental assembly, and consequently unless such approval was obtained, the title was not regarded as perfect and complete. (Though properly subject to confirmation—Reading and Fremont cases, supra.) *Public establishments* of the department could not be granted under these laws, nor even lands which were *in the lawful possession and occupancy of persons claiming provisional title under the government.*"

Indeed, if the "easement" of confiscation, set up here could, as it cannot, be strained out of article five of the laws of 1824, and imputed as a sovereign prerogative to the Mexican government, it would not be communicable, by treaty or otherwise, to a government of constitutional guarantees like ours, in which it is repugnant to our traditions and policy, to the letter of our federal constitution and of our state constitutions, to take over the private property and vested rights of the citizen, except upon just compensation. It is aptly said by Mr. Justice Story, in his dissenting opinion in the Charles River Bridge case, 11 Pet., at page 641:

"Although the sovereign power in free governments may appropriate all the property, public as well as private, for public purposes, making compensation therefor; yet it has never been understood, at least never in our republic, that the sovereign power can take the private property of A. and give it to B., by the right of 'eminent domain'; or that it can take it at all, except for public purposes; or that it can take it for public purposes, without the duty and responsibility of making compensation for the sacrifice of the private property of one, for the good of the whole. These limitations have been held to be fundamental axioms in free governments like ours, and have accordingly received the sanction of some of our most eminent judges and jurists."

In Pumpelly v. Green Bay Company, 13 Wall., pp. 177-8, it is said by Mr. Justice Miller:

"It will be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendations of jurists, statesmen, and commentators as placing the just principles of the common law beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the

government, and would make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

And in Chicago & Burlington Railroad v. Chicago, 166 U. S., at pp. 235-6, this court said:

"In Davidson v. New Orleans, above cited (96 U. S. 97, 102), it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and commiting to the judiciary, expressly or by implication, authority to enforce the provisions of such construction. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on constitutional law says, 'is that of enjoying private property without undue interference or molestation'. The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

And, further, as Mr. Chief Justice Taney puts it in the Fremont case, 17 How., p. 564—the case of a Mexican grant of 1844, conveyed to an American citizen in 1847, and confirmed under the act of March 3, 1851:

> "Any Mexican laws, inconsistent with the rights of the United States, or its public policy, or with the rights of its citizens, were annulled by the conquest."
>
> "It cannot be admitted," this court has said (Pollard's lessee v. Hagan, 3 How. 212, 225), "that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it."

There is, of course, no suggestion or hint of this supposed easement in the treaty of Guadalupe Hidalgo. If it may not be imparted as a sovereign prerogative, what of its proprietary aspect, looking, now, at the Mexican government in the status of a proprietor? In this point of view, it would be an easement, not appurtenant, as between a servient and a dominant tenement, but an easement personal and in gross, and therefore not an assignable quantity (Jones on Easements, sec. 422; Salem Co. v. Stayton, 33 Fed. 146, 154; Wagner v. Hanna, 38 Cal. 116). And such was the rule, as well, of the civil law, prevailing in the Latin countries (Domat, Civil Law, paragraph 974).

The history of Mexico is chequered with revolution and change,—the revolt from Spain, the brief empire of Iturbide, the constitution of 1824, the constitution of 1836, the constitution of 1843, the war with this country and the conquest of California by the American forces on July 7, 1846. The constitution of 1824 was a federal constitution; it organized the republic into states. In 1836, centralism had the upper hand, and a constitution was framed, abolishing the states, and substituting departments under the jurisdiction of governors appointed by the central authorities (U. S. v. Coe, 170 U. S. 681, 690). In the Coe case, it was held that, from and after the adoption of the constitution of 1836, no power was vested in the former states, as such, to make grants of public land (Camou v. U. S., 171 U. S. 277, 279). But the procedure in the territories, under the laws and regulations of colonization, even under the later constitution of of 1843, like that of 1836 central in aspect, remained unaltered (U. S. v. Vigil, 13 Wall. 449, 450, 453). In Camou v. United States, 171 U. S. 277, the laws of August 18, 1924, out of which the alleged easement here is attempted to be deduced, were somewhat fully gone into. This case would seem to dispose of the contention that this government may, or that the Mexican government could, appropriate, without compensation, for military occupancy and use, a tract of granted land, no longer vacant and public, title to which had passed, by competent authority, whether state or national, into private ownership.

The grant in the Camou case, was a state grant. It was made by the State of Sonora. It was issued by state authority on April 29, 1833,—anterior, therefore, to the constitution of 1836, which abolished the states. It was not a colonization grant. It was a grant by auction and sale, under a law of the State of Sonora.

The opinion of this court by Mr. Justice Brewer, reviews the provisions of the constitutive act of the Mexican federation, of July 31, 1824; and of the constitution of October 4, 1824, and finds that these provisions

> "at least point to some control by the states over vacant lands within their limits, and suggest the exercise by those states of the right to make concessions of those lands" (p. 281).

Attention is then drawn to the colonization law of August 18, 1824. While the grant in question was not under the colonization law, the court refers to that law

> "as showing a recognition by the general government of some authority on the part of the states in reference to the *vacant* lands. It will be seen," the opinion goes on, "that while article two speaks of 'the lands of the nation', article three directs the states to enact colonization laws in conformity to the general provisions of the constitution. So that the actual management of colonization affairs was put within the control of the states, subject, of course, to the superior dominion of the general government. Article ten provides that military rights to lands, though created by the nation, shall be attended to by the states; thus implying

> at least that, for convenience, administration of the vacant lands was entrusted to the states. Obviously the thought here was, that there should not be two places in which the administration of the public lands should be carried on; and so, in article eleven, it was provided that if, in the judgment of the nation, it was expedient to grant to a military or civil officer any public lands, it was to be made from *vacant* lands in the territories. And finally, in article sixteen, as though to separate the administration of the public lands in the states from those in the territories, it is distinctly declared that the *national government* will colonize the *territories* of the republic. As heretofore said, all this, of course, amounts only to *assigning to the states* the *administration* of the *vacant* lands for purposes of colonization."

And the court finds it unnecessary to resolve the question whether the actual title to public lands within the limits of the state, dwelt in the states, as has been affirmed judicially (Chambers v. Fisk, 22 Tex., pp. 521-2, 527, 528-9, 530-31; Republic v. Thorn, 3 Tex., p. 509).

The court now takes up the law of August 4, 1824, under which the state claimed authority to make the grant in question, as by proceedings of an auction and sale. This law deals with the general revenues, pertaining to the federal government, and with the special revenues, pertaining to the states. Revenues from such sources as import and export duties, tobacco, powder, are attributed to the general government; so, likewise, revenues from the territories of the federation. It is then provided, in the ninth article:

> "National property, in which is included that of the inquisition and temporal property of the clergy, or any other rural or urban property that belongs, or shall hereafter belong to the public exchequer" (shall be general revenue).

Article ten provides:

> "The buildings, offices, and the lands attached thereto, which belong, or have belonged, to the general revenues, and those that have been maintained by two or more of what were formerly provinces, are at the disposal of the government of the federation."

Then comes article eleven:

> "The revenues not included in the foregoing articles belong to the states."

On a view of these articles, the court finds the ninth article indefinite, "in that it fails to define what is national property". The language is broad enough to include all public lands, "and yet if it was intended to include such lands, it would seem scarcely necessary to add the clause including those taken from the clergy". The tenth article merely refers to public buildings and the grounds attached to them; "not to *vacant public* lands". The eleventh article does not define what revenues belong to the states, "and depends for its scope upon the significance and force of the prior articles". If, then, these articles were all, "it would be difficult to infer from them that the vacant public lands were given to the states for purposes of sale or for appropriation of the proceeds of such sales".

But these articles are not all. There is more behind. In this same statute there is a provision that

> "the sum of $3,136,875—estimated as the deficit in the general expenses—shall be apportioned among the states of the federation";

and the apportionment is made and stated. Other sections of this same statute require the delivery by the states, each month, of their several parts of the above apportionment, and a final adjustment of the amount thereof between the government and the states.

> "This implies", the court observes, "that, within the limits of the state, there were certain matters of revenue, out of which the states were to collect the sums apportioned to them, and to return the same to the general treasury".

Subsequent legislation, says the court, throws light on the meaning of this revenue law; and just here, the court draws attention to the law of April 6, 1830.

The law of April 6, 1830, is now set forth in terms as follows (pp. 284-5):

> "The government shall have power to appoint one or more commissioners to visit the colonies of the *frontier states,* to contract with their legislatures for the *purchase,* in the name of the federation, of the *lands* they may consider suitable and sufficient for the *establishment of colonies* of Mexican and of other nations, to enter into such arrangements with the colonies already established as they may deem proper for the security of the republic, to see to the exact compliance with the contracts (impresario

contracts) upon the entry of new colonies, and to examine as to how far those already entered into have been complied with."

Next is quoted article four of this same law of April 6, 1830. It reads:

> "The *executive* shall have the *power* to *take the lands* he may consider *suitable for fortifications and arsenals,* and for *new colonies* and shall give the *states credit* for their value *on the accounts they owe the federation.*"

We have seen what these accounts are which the states owe, and the amount of which, $3,136,875, has been apportioned among the states. Here, now, in paragraph four of the law of April 6, 1830, is an authoritative national interpretation of section five of the law of April 18, 1824. The lands which the federal executive may deem it expedient to make use of for the purpose of arsenals or other defensive purpose—the lands upon which the alleged easement is to be exercised—are the vacant public lands, taken from the *states,* and to be paid for *to* the *states* by a credit upon the amount of the indebtedness of the states to the general government. They have not yet arrived into private ownership, they are still in the states, ungranted to private owners, from the states they are to be taken, and to the states compensation for them is to be made.

This court proceeds to remark upon paragraph four as follows:

> "The language of this decree is very significant, and clearly recognizes *some title in the states;* for why should commissioners be author-

ized to contract with the legislatures of the states for the *purchase* of lands which belong to the nation? It also clearly recognizes the right of the states to sell *these vacant lands* and apply the proceeds in settlement of the demands made against them by the general apportionment of the revenue law of 1824. It declares that the *executive* may *take the lands* he considers *suitable for fortifications, arsenals,* and for *new* colonies, and, *at the same time,* provides that *he* shall *give the states credit* on the amount they owe the confederation. But why should any credit be given *if these* lands, so taken by the executive, were the property of the nation, and the states without authority to sell them or receive the proceeds of sale? If, during all these years, the lands were the property of the nation, were to be held and sold only by the nation, and the proceeds thereof to be accounted for directly to the nation, *why should it be decreed* that *if* the *nation* takes any part of them *for arsenals and other public purposes,* credit for the value thereof is to be entered upon the amounts due *by the states* to the nation? We find it difficult to escape the force of this decree of 1830. It indicates that although the language of the revenue decree of 1824 is indefinite, and does not in terms name *vacant public lands,* yet both the nation and the states understood that its effect was to grant authority *to the states* to sell *such lands,* and appropriate the proceeds in settlement of the amounts charged against them by the nation. We see no other way in which to give reasonable force to the language of this decree of 1830, and it must be held to be *a national interpretation* of the revenue decree of 1824" (pp. 285-6).

And the court adds:

"But we are not limited to *this authoritative national exposition* of the meaning of the reve-

> nue law of 1824. The testimony in the several cases of a similar nature now before us, including therein the reports of the officers of this government sent to examine the archives of Mexico, discloses that the state of Sonora, at least, assumed that the revenue act of 1824 *authorized its disposal* of the *vacant public lands,* and acting on that assumption did in a multitude of cases make sales thereof. In this connection, it may be observed that the constitution of the state of Sonora, or State of the West, declares article 47, that the right of selling lands belongs to the state. This constitution bears date May 11, 1825. Law, No. 30 of that state, of May 20, 1825—the law referred to by the Treasurer General (of the state) in in the expediente—recites that 'The congress has seen fit to decree the following provisional law for the purchase of the *lands of the state.*' Subsequent legislation of the state is in the same line" (p. 286).

This court points out that the constitution, the laws, and the actual transactions of the state, in respect to the disposition of the public lands, must have come to the notice of the federal congress, and without objection thereto. Sections eight and nine of article 161 of the national constitution of 1824, are set forth, making it the duty of each Mexican state—

> "To present annually to each one of the houses of the General Congress a minute and comprehensive report of the amounts that are *received and paid out* at the treasuries within their limits, together with a statement of the *origin of the one and the other.*"

And also—

> "To forward to the two chambers (of the federal government), and when they are in recess, to the council of the government, *a certified copy of their constitutions, laws, and decrees.*"
>
> "It may be assumed", this court continues, "that these requirements of the national constitution were complied with, and that the constitutions, laws and decrees of the state, and the proceedings had in reference to these several sales of land, were reported to the congress of the nation. We find no act of that congress setting aside such legislation or sale. This is significant," the court observes, and it refers to Clinton v. Englebrecht, 13 Wall., 434, 446, as an appropriate citation. (pp. 286-7.)

In the result, it is said by the court:

> "Our conclusion is, that, *at the time* of these transactions, the several states had authority to make sales of *vacant public lands* within their limits, and that such sales, unless annulled by the national government, must be considered as grants to be recognized by this government under the terms of the treaty of 1853" (Gadsden Treaty).

Servidumbres

In the grant to Carrillo (Tr., p. 28) it is prescribed as a condition:

> "He may enclose it, without prejudice to the *crossings, roads,* and servitudes (The Spanish word, in the original, here translated 'servitudes', is 'servidumbres'), and enjoy it freely and exclusively, making such use or cultivation of it as may best suit him."

The suggestion has been thrown out, by the way, and it would seem without serious conviction, that the "easement" attributed to Article 5 of the law of 1824, may possibly be affiliated upon the term "servidumbres". It is plain to be seen that what the grant has in its intendment, is to protect established roads, crossings, and other things of like nature, from interference by the grantee. In Harvey v. Barker, 126 Cal., 262, the California Indians were opposing to the confirmed grant on which plaintiff stood, an easement of occupancy which had not been presented for confirmation, as required of any derivative Spanish or Mexican title, under the act of March 3, 1851. It was held by the Supreme Court of California that any Indian title by easement must fail, for want of presentation to the commission under the act of March 3, 1851; and this court, as will be noticed presently, affirmed the holding. But it was contended, nevertheless, for the Indian title, that the easement of occupancy was reserved and retained by reason of the customary language in the grant, as in Mexican grants generally, against interference with crossings, roads, and "servidumbres" (U. S. v. Ritchie, 17 How., p. 536). Counsel took the position, to give it in the language of the Supreme Court of California:

> "That under the Mexican law, Warner (the original grantee of the confirmed and patented grant of 1844) held the legal title subject to the easement of the Indians' possessory rights, and that the confirmation of the legal title and issu-

ance of the patent in no way changed the character of such title, nor freed it from the easement in favor of the defendants." (p. 267)

An earlier grant, in 1840, had been made to Pico (p. 263), but that grant failed of confirmation and was rejected. (p. 270) The Pico grant enjoined it upon Pico "not to molest the Indians that thereon may be established" (p. 263). The conditions in the confirmed grant to Warner were like those in the Pico grant, "with the exception that it omits entirely the clause 'not to molest the Indians that thereon may be established'" (p. 265).

It was said by the Supreme Court of California:

> "It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of the Indians. Not to interfere with roads and other usages (servidumbres), under the circumstances cannot be tortured into the equivalent of a reservation in the grant to 'not molest (prejudicor) the Indians that thereon may be established'."

Harvey v. Barker was affirmed in this court, 181 U. S., 481, 498, 499.

> "The grant to Pico," it was here said, "was made subject to the condition that he should 'not molest the Indians that thereon may be established'. No such condition was attached to the subsequent grant to Warner."

It is further said by this court:

> "Some discussion appears in the briefs as to the meaning of the word translated 'usages' (servidumbres), which appears in both grants,

and it is contended by the plaintiffs in error that it is equivalent to the English word "servitudes', and is broad enough to include every right which anyone may have in respect to the premises, subordinate to the fee. We shall not attempt to define the meaning of the word standing by itself. It may be conceded that it was sometimes used to express all kinds of servitudes, including therein *a paramount right of occupation,* but the context seems to place a narrower meaning upon its use here. Thus, in the first grant, not only is there the distinct provision that the Indians established on the lands shall not be molested, but the grantee 'is allowed to fence it in without interfering with the roads, cross-roads, and other usages' (servidumbres). In the second (the Warner grant), the grantee is 'allowed to fence it in without interference with the roads and other usages' (servidumbres). Obviously, it is in these two clauses contemplated, that the fencing is to be without interference with roads and other usages or burdens. It does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross-roads, *or other things of like nature.*"

An analogy, also, is fetched from far—from the banks of the Mississippi. Eldridge v. Trezevant, 160 U. S., 452, is cited. It was, as this court said,

"The doctrine existing in the territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensa-

tion. This doctrine is said to have been derived from the Code Napoleon, whose 649th and 650th articles were as follows:

'Servitudes established by law have for object the public or communal utility, or the utility of private persons. Those established for the public or communal utility, have for object the tow paths along the navigable or floatable rivers, the construction or repairing of roads, and other public or communal works. All that concerns this kind of servitude is determined *by laws or particular regulations*'."

"But whether," this court went on to say, "the servitude in question was derived from French or Spanish sources, or from local and natural causes, we need not inquire, because it is *explicitly asserted* in the Civil Code of Louisiana, article 661, in the following terms:

'Servitudes imposed for the public or common utility relate to the space which is left for public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common works. All that relates to this kind of servitude is determined by laws or particular regulations'."

And this court, quoting from the Supreme Court of the state of Louisiana, adds:

"In this state (Louisiana), *so much exposed to ruinous inundations*, the public have the undoubted right, on the shores of the Mississippi River, to the use of the space of ground necessary for the making and repairing of the public levees and roads. C. C., Art. 661. It was the condition of the ancient grants of land on the Mississippi River, and sufficient depth was always given to each tract, to prevent the exercise of the public rights from proving ruinous to the individual."

Plainly, the court, in the Eldridge case, was not dealing with a clause against interference by the grantee "with established roads or cross-roads *or other things of like nature,*" found in Mexican grants, confirmed to claimants of land in California (Barker v. Harvey, 181 U. S., p. 499).

The rule as to riparian rights.

Reference is made in the government's brief to the case of City of Los Angeles v. Los Angeles Farming & Milling Co., reported in 152 Cal., 645, and 217 U. S. 217.

This case is not the instance of an original proceeding under the act of March 3, 1851, in which a claimant presents his grant for confirmation, and to which the claimant, as plaintiff, and the United States, as defendant, are the parties. The Los Angeles case was a controversy between third persons. It was subsequent upon, and outside of, the act of March 3, 1851.

The Los Angeles Milling Company, under a Mexican grant, of date June 17, 1846, duly confirmed and patented, was the owner of a tract of land, riparian to the Los Angeles river, and lying up-stream from the City of Los Angeles (217 U. S. p. 219). Other things being equal, as matter of simple topography, the milling company was the upper, and the City of Los Angeles was the lower, proprietor. For that City, too, came down to the banks of the stream.

But other things were not equal. Los Angeles began as a Spanish Pueblo, established in 1781. The

City of Los Angeles, as the successor of the Pueblo, presented its claim under the act of March 3, 1851, for confirmation, and the same was duly confirmed and patented.

> "Under the laws of the Kingdom of Spain, said Pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the waters of the river, and such paramount right continued to exist under that government and under the Mexican government, until the acquisition of California by the United States" (217 U. S., p. 221).

No federal question, no issue of law, under the constitution, statutes and treaties of the United States, was presented. Both parties stood upon titles derived respectively from Spanish and Mexican origin, duly confirmed and patented under the Act of March 3, 1851, and those titles, as for their delimitation, took both parties down to the Ripa of the Los Angeles River. To what extent the two proprietors, as riparians, had rights in the waters of the stream, and, as between themselves, who had the paramount right—this was not a federal question, it was a question of the local law depending upon the comparative rights of an individual and a pueblo, both riparians, to the water as it flowed. The local law, the law of Spain and Mexico, put the community or pueblo, justly enough, ahead of the individual. That was the case, and that was why this court declined jurisdiction.

The Supreme Court of California quotes the language of this court in Hardin v. Jordan, 140 U. S., 371:

> "In our judgment, the grants of the government of land bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie".

And the Supreme Court of California goes on to say:

> "The right of a riparian owner in fee of land to the use of natural water running through it, is subordinate to any paramount right to the use of such water existing *under the general law* in some other person. The only question in the case, therefore, is whether, under the general law of the locality, the old pueblo of Los Angeles, and the respondent herein as its successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles River as is necessary for its inhabitants and for general municipal purposes" (152 Cal., p. 650).

The court finds this question answered by its own decisions. The pueblo had the superior right.

> "The riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the water; and *semble* that the pueblos had a preference or prior right to consume the waters even as against an upper riparian proprietor".

And upon this, the case went off. (152 Cal., 651.)

When the case came here (217 U. S. 218), jurisdiction was declined upon the ground that no federal question was presented, and that the issue in hand was resolvable by the law of the locality. The act of March 3, 1851, was not the source of title, but the Spanish, or Mexican, law. The act of Congress "did not originate federal rights or titles, but merely confirmed the old ones." "And this court has frequently held that the extent of the right and title of a riparian owner under a patent is one of local law" (p. 233).

> The defect of the Milling Company's contentions "from the standpoint of federal jurisdiction is, that this court has already determined, in the cases above cited, that the act of 1851 was a confirmatory act; that by its terms it did not undertake to *originate* titles, or make the *patents*, to be issued in pursuance of the decisions of the Commission, conclusive *except upon the United States;* and that the extent of the riparian rights belonging to pueblos or persons, receiving such patents, are matters of local or general law. In this view, the Writ of Error must be dismissed for want of jurisdiction" (p. 234).

Boquillas Cattle Co. v. Curtis, 213 U. S. 342, like the Los Angeles case, was a controversy over the use of running water, determinable by the law of the locality, and arising between a riparian proprietor and an appropriator. It came to this court on appeal from the judgment of the territorial court of Arizona. The land of the cattle company was riparian to the San Pedro River. The company derived

its title from a grant of the state of Sonora in 1833, confirmed, under the act of March 3, 1891, by a decree of the Court of Private Land Claims on February 14, 1899, and a patent from the United States, of December 14, 1900 (p. 342).

The claim of the defendants rested on appropriation—"That they have been the first to appropriate the water" (p. 343).

This court goes at once to the local law, as declared in the opinion of the territorial court.

> "Whatever may have been the general law throughout the republic of Mexico on the subject of waters, it is reasonably certain that in the state of Sonora the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this Territory, irrigation was practiced in the Santa Cruz Valley prior to the cession; and it is well known the right of appropriation, without regard to the riparian character of the land, was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom" (p. 342).

And this court points out, with some particularity, the provisions of the statutory Bill of Rights of the Territory, dealing with the use of running water, declaring the streams public, recognizing the right of land owners in general to withdraw the water by irrigating canals, passing, if need be, through private lands, subject to assessment for damages, awarding precedence, in time of scarcity, to the oldest titles, and enacting that

> "the regulation of acequias (irrigating canals), which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day" (p. 346).

The appropriator, therefore, was sustained on the foot of the local law. The grant and patent, it is true, carried the Cattle Company to the bank of the stream; but the patent did not "create" or originate the title,—that went, for its *fons et origo,* to the Mexican law. Standing on the river bank, what rights the patentee had in the water flowing at his feet, made a question for the local law. The Act of Congress, with its decree and patent, did not purport either to create or to enlarge the grant. It confirmed the grant, leaving the question of supervening water rights to the standards of the local jurisdiction (p. 344).

It is now, therefore, on the whole submitted that under Article 5 of the law of August 18, 1824, the grant to Carrillo was not subject to the alleged easement of occupancy for military and naval purposes.

II.

THE DECREE OF CONFIRMATION AND THE RESULTING PATENT ASCERTAINED AND SETTLED THE TITLE OF THIS RESPONDENT CONCLUSIVELY BETWEEN THE UNITED STATES AND RESPONDENT.

Act of March 3, 1851.

This is the Act "to ascertain and settle the private land claims in the state of California" (9 Stats.,

631). A board of three commissioners is constituted for the purpose (Sec. 1).

> "Each and every person (Sec. 8) claiming lands in California by virtue of *any* right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims;
>
> "And it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced *in behalf of the United States,* and to decide *upon the validity of the said claim.*"

By a proceeding nominally appellate, but really in the nature of a suit *de novo* (Section 9; Section 12 of amendatory Act of August 31, 1852, 10 Stats., 99; U. S. v. Ritchie, 17 How. 524, 533), either party might apply to the District Court "to review the decision of the said commissioners, and to decide *on the validity of such claim*". And by Section 10 of the original Act, an appeal lay, "on application of the party against whom judgment is rendered", to this court.

> "The primary object of the Act (Rodrigues v. U. S., 1 Wall. 582, 588) was to *ascertain* and *separate* the *public domain* from that which had become, under the Mexican government, private property; and hence, in every case, the *claimant* was *plaintiff* or actor, and the *United States* was *defendant.*"

Section 11 provided:

> "That the commissioners herein provided for, and the district and supreme courts, in deciding *on the validity of any claim* brought before them under the provisions of this act, shall be governed by the Treaty of Guadalupe Hidalgo, *the laws, usages, and customs of the government from which the claim is derived,* the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

It was, therefore, to the regulations of 1828, authorized by the law of 1824, that the commissioners and the courts were to look for *"the laws and usages* by which the validity of a Mexican title is to be determined" (U. S. v. Elder, 177 U. S., p. 116). These Mexican laws, "upon which the titles to land" in California depended, "must be judicially noticed and *expounded"* by the commissioners and the courts. (U. S. v. Turner, 11 How., p. 667.) They

> "were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the union" (Fremont v. U. S., 17 How., p. 556).

Section 13 makes it the duty of the Surveyor General of California "to cause all private claims which shall be finally confirmed to be accurately surveyed"; and for all claims finally confirmed "a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or sur-

vey of the said land, duly certified and approved by the Surveyor General of California". And by Section 15, it is provided:

> "That the *final decrees* rendered by the said Commissioners, or by the District or Supreme Court of the United States, or any *patent* to be issued under this Act, *shall be conclusive between the United States and the said claimants only,* and shall not affect the interest of third persons."

Section 13, it may be added, has a feature of limitation, and in that connection, a declaration as to what lands shall be deemed a part of the public domain of the United States. The language is:

> "All lands, the claims to which have been rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court; and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this Act (it was for a failure to present the Indian easement of occupancy within the two years, that it was pronounced against in Harvey v. Barker, supra), shall be deemed, held, and considered *as part of the public domain of the United States.*"

What was the object of the Act of March 3, 1851, if it was not to prevent just such a controversy as is now pending in the case at bar? The eighth section sweeps within the jurisdiction of the commission and the courts all lands in California claimed "by virtue of *any* right or title derived from the Spanish or Mexican government". And so it was that the easement of occupancy, in Harvey v.

Barker, supra, was rejected for want of presentation within the two years. All claims, perfected and legal, or inchoate and equitable—"any right or title"—were subjected to examination. The end was, to give peace and stability to titles, and to foreclose future controversies. In Fremont v. U. S., 17 How. 542, 543, quoted and approved by this court in Botiller v. Dominquez, 130 U. S., at page 252, it was said:

> "It will be seen from the quotation we have made, that the eighth section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination, and to be passed upon by the court. The object of this provision appears to be, *to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.*"
>
> "The main purpose of the statute", said Mr. Justice Miller in the Botiller case (p. 249) "*was to separate and distinguish* the lands *which the United States owned as property,* which could be sold to others, either absolutely or by permitting them to settle thereon with pre-emption rights, *or which could be reserved from public sale entirely,* from those lands which belonged, either equitably or legally, *to private* parties under a claim of right derived from the Spanish or Mexican governments.
>
> "When this was done" (he continues), "the aim of the statute was attained. The order of the Commissioners, or the decree of the court, established, as between the United States and the private citizen, *the validity or the invalidity of such claims,* and enabled the government of the United States, out of all its vast domain,

> to say *'this* is *my* property', and also enabled the claimant under the Mexican government, who had a just claim, whether legal or equitable, to say, *'this* is *mine'*."
>
> "No doubt could exist," says Mr. Justice Miller (p. 250), "and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided *that the United States should sue everybody* who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title, if he had any. Such suits would have been sustained without hesitation, as being legal, constitutional, and according to right".

If, then, as Mr. Justice Miller suggests, the United States had found us in possession, and had sued us, setting up its alleged easement, against which we opposed our grant, and if the suit had resulted in a final decree and patent to us, without reservation or exception of an easement of occupancy, would it lie in the mouth of the government, after more than half a century of time, to renew the assertion of its alleged interest in the land by way of easement? What difference would it make that in such a proceeding we happened to be defendant, while in the proceeding as actually taken, under the Act of March 3, 1851, we were the plaintiff, and the government was the defendant? Indeed, Mr. Justice Miller goes on to remark (p. 250):

> "*What difference can it make, then,* that the party who is supposed to possess all the evidences which exist to support *his* claim, is called

upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended, and better calculated to save time and expense, both to the government and to the party, and to arive at safe and satisfactory conclusions."

Now, then, Section 5 of the law of August 18, 1824, and all the other sections of that law, and all the regulations of November 21, 1828, were judicially known to the commission and the courts in confirming the grant now before the court, and they were "the laws and usages", under Section 11 of the Act of Congress, "by which the *validity* of a Mexican title is to be determined" (U. S. v. Fremont, supra; U. S. v. Turner, supra; U. S. v. Elder, supra). And if, resident in the terms of Section 5, there had lurked some easement of occupancy in the government, it would have been the duty of these tribunals to have brought it to the light, to have declared it, to have reserved it by the decree, and thereby to have defined "the legal operation" of the grant.

"What are the questions", this court asked in U. S. v. Fossatt, 21 How. 445, 448, "involved in the inquiry into the validity of a claim to land?" The court answers:

"It is obvious that the answer to this question must depend, in a great measure, upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evi-

dence is forged or fraudulent; or it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of conditions. Questions of each kind here mentioned have been considered by the court in cases arising under this law (the Act of March 3, 1851).

"But, *in addition* to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, *and legal operation*, that are *equally essential* in determining the validity of the claim. In affirming a claim to land under a Spanish or Mexican grant to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee."

And the court, happily enough, mentions the case of Mitchell v. U. S., 15 Pet. 52, in which

"certain property *about Fort St. Mark's* was *excepted* in the *original decree of confirmation*, and *reserved to the United States*, and the Superior Court in that decree was directed to ascertain the extent and boundaries of the land *reserved*".

The District Court may have been wrong, we venture to think it was not, in confirming this grant without any reservation to the United States of this alleged easement; the attorney general may have

been wrong in dismissing the appeal, with leave to claimant to proceed on the decree of the District Court as under a final decree; the Department of the Interior may have been wrong in delineating the grant on the plat of the survey, and in issuing the patent. But if they were all in error, it was error in the exercise of a clear jurisdiction. They were all empowered to decide, right or wrong, and their decision is now unassailable. *Sit finis litium.*

> "The board, having jurisdiction of the claim," said this court in Lynch v. Bernal, 9 Wall., p. 322, "its validity and title to recognition and confirmation were subjects for that tribunal's determination, and its adjudication, however erroneous, cannot be collaterally assailed on the ground that it was made upon insufficient evidence. The rule is as applicable to inferior and special tribunals as it is to those of superior or general authority,—that where they have once acquired jurisdiction, their subsequent proceedings cannot be collaterally questioned for mere error or irregularity."

U. S. v. Workman, 1 Wall, 175, was a direct proceeding under the Act of March 3, 1851, between the claimant and the United States as parties, for the confirmation of a Mexican grant of land in California, made by the governor, Pio Pico, on June 8, 1846. The grant was not one in colonization or settlement. It was in the nature of a sale of the Mission of San Gabriel, under alleged authority of the governor. The Commissioners, under the Act of March 3, 1851, confirmed the claim. Their decision was affirmed by the decree of the District

Court (p. 745). On appeal to this court, the decree of the District Court was reversed. It was held here that under the law of August 18, 1824, and the regulations of November 21, 1828, "ample authority was conferred upon the governor of California to grant *vacant* lands belonging to the supreme government". But such authority was limited "to the granting of unoccupied public lands". "Public establishments of the department could not be granted under those laws, nor even lands which were in the lawful possession and occupancy of persons claiming provisional title under the government" (p. 761). It was held, on a review of the powers of the governor, that he acted in excess of his authority in directing the sale of mission lands. That was "a power he never possessed" (p. 765). The commissioners and the District Court were found to be in error, the decree was reversed, and the petition for confirmation was dismissed (p. 766). Such was this direct proceeding.

Now, in the light of this direct proceeding, and of the ruling of this court, the case of Los Angeles Farming and Milling Company v. Thompson, 117 Cal. 594, is to be read; for the grant here, like the grant in the Workman case, was of mission lands, under an order of Governor Pico, who executed the grant on June 17, 1846. The grant was confirmed by the commissioners, whose decision remained final, and was followed, on January 8, 1873, by the United States patent (pp. 597, 598). This case, however, was not a direct proceeding between claimant and

the United States. It was an action by the successor in interest of the patentee, against the defendants, who were in possession, to recover the land. The plaintiff rested his title on the patent (p. 597).

The defendants stood upon the alleged infirmity of the grant and confirmation. They offered to introduce in evidence the petition of the claimant to the board for confirmation, together with the grant from Pico, and the decree of confirmation made by the board. Their point was, that it appeared by the petition and the grant, "that petitioner did not claim said lands by virtue of any right or title derived from the Spanish or Mexican government". And they contended

> "that said grant was void, for the reason that it was an attempted grant of mission lands, reserved from and not subject to grant under the laws and regulations of the Mexican government; and that the facts stated in said petition and in said grant proved that said board had no jurisdiction over the subject-matter of said case, and that the decree confirming said claim was without jurisdiction and void" (p. 598).

The trial court rejected the offer, and excluded the evidence. This ruling was assigned as error by the defendants.

> "In support of their claim, they contend that the only claims to land which the Board of Land Commissioners had jurisdiction to pass upon were such as were 'by virtue of any right or title derived from the Spanish or Mexican government' and that, as the petition for confirmation showed that the claim was not by virtue of such right or title, the Board had no

jurisdiction over it; and that its decree of confirmation, as well as the patent issued thereon, were void, as being the acts of officers *without authority* over the subject matter upon which they acted; that it appears upon the face of the petition that the Board of Land Commissioners had no jurisdiction in the matter *for the reason that at the date of the grant the governor of California had no authority to make a sale of this land*" (p. 598).

The Supreme Court of California now proceeds to say:

"In support of the latter proposition, appellants cite the cases of United States v. Vallejo, 1 Black 541, and United States v. Workman, 1 Wall. 745. These were cases, however, in which *appeals* were taken by the United States *directly* from the decree of confirmation, and were *direct attacks* upon the validity of the judgments appealed from; whereas the evidence offered in the present case, is for the purpose of a collateral attack upon the validity of the decree of confirmation. The Board of Land Commissioners was authorized to adjudicate *upon the validity* of every claim for lands in California which purported to be derived from the Spanish or Mexican government. The *validity of the claim* included the *authority of the governor* to make the grant, as well as *the existence or effect of the laws of Mexico concerning the same* (a palmary instance of the existence and effect of the laws of Mexico concerning the grant, would be this very section 5 of the laws of 1824, invoked to deduce the alleged easement); and the *jurisdiction* of the board extended to *the determination of each of these questions as fully* as to determining whether there had been a full compliance with the forms of law in making the grant, and its

judgment thereon cannot be collaterally assailed *on account of any error* it may have committed in reference thereto" (p. 599).

The Supreme Court of California quotes from the decision of this court in Beard v. Federy, 3 Wall. 478, both as to the effect of the decree, and as to the effect of the patent.

As to the decree:

> "The Board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

As to the patent:

> "By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, this record, *so long as it remains unvacated,* is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent" (pp. 599-600).

The Thompson case was brought here. It is reported in 180 U. S. 72. In support of the assignment of error, it was urged "that the governor of the Californias had no authority to make the grant, and therefore the decree of confirmation was without that authority of law, and was absolutely void,

and a mere nullity. And it is hence further contended that the patent based on and reciting the decree was void on its face". In a word, "the grant being void, it could not be the basis of a claim to land 'by virtue of any right or title derived from the Spanish or Mexican government'" (Section 8, Act of March 3, 1851). This court disposes of the contention in this expressive language:

> "We think that counsel put too limited a signification on the words of section 8, that the claim shall be 'by virtue of any right or title derived from the Spanish or Mexican government'. The words, of course, were descriptive of the class of claims of which the Board of Land Commissioners was given jurisdiction. They made a special tribunal of the Board, limited to hear a particular class of claims, but *not limited* to the questions of law and fact which *could arise* in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the claim—propositions of law or propositions of fact—the fact of a grant, or the power to grant, was conferred. If there should be a wrong decision, the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the district court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. *Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the Act of 1851 to give repose to titles.* It was enacted not only to fulfill our

treaty obligations to individuals, but to settle and *define what* portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the Board, and barred all from future assertion which were not presented within two years after the date of the Act (Sec. 13). The jurisdiction of the Board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction *to decide rightly or wrongly.* If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant *or by the United States* to the district court (Sec. 9). Indeed, the proceedings in the district court were really new, and further evidence could be taken (Sec. 10). Upon the confirmation of the claim by the commissioners, or by the district or supreme court, a *patent* was to issue and to be *conclusive against the United States* (Sec. 15)" (pp. 77-8).

As to the effect of the patent, the court said, quoting from Beard v. Federy, 3 Wall. 478:

"This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, *so long as it remains unvacated,* is *conclusive.* And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent *as a record of the government* that its security and protection chiefly lie. If parties asserting interest in lands acquired since the acquisition of the country, could deny and controvert this

> record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, *an instrument of quiet and security to its possessor*" (p. 79).

Harvey v. Barker, 126 Cal. 262, has been referred to on the question of "servidumbres". It is illustrative at this point. There were two grants, it will be recalled, an earlier grant to Jose Pico, of 1840, reserving the possessory right—an easement of occupancy, of the Indians established on the land; and a later grant of 1844, to Warner, containing no reservation of the easement (p. 263). When the successor in interest of Warner undertook to recover possession, standing upon the United States patent issued to Warner on January 16, 1880, he was opposed by this alleged easement. It was claimed, on behalf of the Indians:

> "That under the Mexican law, Warner held the legal title *subject to the easement* of the Indians' possessory rights, and that the confirmation of the legal title and issuance of the patent in no way changed the character of such title, *nor freed it from the easement* in favor of the defendants" (p. 267).
>
> "The *grant* to Warner *neither reserved nor preserved* any possessory or other right or supposed right in the Indians,"

as the Supreme Court of the State points out (p. 270). And again:

> "We are not permitted to go behind the patent in a case like this" (p. 271).

"If any rights whatever can be conceded to the appellants under the former Mexican government", the court goes on to say, "such rights were in the nature of private property, or a right dependent upon the will and pleasure of the state or nation. If, as claimed, it was *a right to possess, occupy, and use land, that amounted to a title to property.* It being a title or right to property, whether in fee simple or possessory, merely, derived from the Mexican government,—under the Act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation" (p. 274).

And again:

"But it is claimed that Warner took his title subject to the trust or right of the Indians. Neither the *grant* nor the *patent* contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon" (p. 277).

The court concludes:

"From the foregoing it follows: 1. That the decision of the Land Commissioners and other appropriate officers of the government of the United States, holding to the effect that the land in question was, at the time it was granted, *vacant,* and subject to *absolute alienation,* is *conclusive* on the defendants and all others. 2. That the grant to Warner of the 'Valle de San Jose' was not subject to any right or interest in the defendant; but that he claimed and held the land granted in hostility to the defendants' pretentions, and there is no trust relation existing between Warner and the said Indians. 3. That the *patent* issued to

> Warner upon the confirmed grant to the premises in controversy is *conclusive* against the defendants" (pp. 277-8).

When Barker v. Harvey came here (181 U. S. 481), the language of Thompson v. Farming Company, 180 U. S., 72, 77, was quoted with approval:

> "Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the Act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but *to settle and define* what portion of the acquired territory was *public domain*" (p. 490).

The court having cited some of its previous rulings, goes on to say:

> "These rulings go far towards sustaining the decision of the Supreme Court of California in the present cases. *As between the United States and Warner,* the patent is as conclusive of the title of the latter *as any other patent from the United States* is of the title of the grantee named therein. *As between the United States and the Indians,* their failure to present their claims to the Land Commission, within the time named, made the land, within the language of the statute, 'part of the public domain of the United States'. 'Public domain' is equivalent to 'public lands', and these words have acquired a settled meaning in the legislation of this country. The words 'public lands', are habitually used in our legislation to describe such as are subject to sale *or other disposal* under general laws" (p. 490).

Again:

> "So far, therefore, *as these Indians are concerned,* the land is rightfully to be regarded as part of the public domain, and subject to sale and disposal by the government, *and the government has conveyed to Warner*" (p. 490).

Touching the language of the 15th section of the Act of March 3, 1851, providing that the patent shall not "affect the interests of third persons" the court inquires, "who may take advantage of this stipulation?" The answer is quoted from Beard v. Federy, 3 Wall., 478, 492, 493, as follows:

> "When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, *record evidence* of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, *so long as it remains unvacated,* is *conclusive.* * * * The term 'third persons' as there used, does not embrace all persons other than the United States and the Claimants, but *only* those who hold *superior titles,* such as will enable them to resist successfully any action of the government is disposing of the property" (p. 491).

And, finally, it is appositely said:

> "If these Indians had any claims founded on the action of the Mexican government, they

abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property'. If it be said that the Indians *do not claim the fee,* but only *the right of occupation,* and, therefore, they do not come within the provision of Section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,'—it may be replied that a claim of *a right to permanent occupancy of land* is one of *far-reaching effect*; and it could not well be said that lands which were *burdened with a right of permanent occupancy* were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it had full title, and of which it has given to an Indian tribe a *temporary* occupancy, and that over lands which were subjected, *by the action of some prior government,* to a *right of permanent occupancy*; for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have *little reason* for presenting to the Land Commission his claim to land, and securing *a confirmation* of that claim, if the only result was to transfer *the naked fee* to him, *burdened by an Indian right of permanent occupancy*" (pp. 491-2).

And, surely, the claimant of the Carrillo grant would have little reason for presenting to the Land Commission his claim to the land in question here, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by this alleged easement of permanent

occupancy. Or, as the district judge said in the court below, referring to the Botiller case,

> "a patentee under this statute could not assert with very much confidence concerning the land he got, that 'this is my property', if the United States could step in at any time and take possession of it forever" (Tr. 22).

Phillips v. Mound City Association 124 U. S. 605, was a suit for the partition of a ranch in Los Angeles County, title to which was derived from a Mexican grant of 1837. After the grant, and prior to the treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848, a partition of the land, it was claimed, had been made under the authority of an appropriate Mexican tribunal by which the share of each of the three owners in common had been set off to him in severalty, and possession taken accordingly (p. 606).

One of the three owners presented his claim for confirmation, under the Act of March 3, 1851, as for an *undivided* part of the rancho. The two other owners likewise presented their petitions, but as for the confirmation, each of them, "of the *specific* tracts allotted to him in the alleged partition". The Commission confirmed the claims "so as to give to each claimant the lands which had been set off to him in severalty by the partition". The district court affirmed the confirmation, adjudging, however, the title of the claimants "to be good and valid, each to one equal *undivided* third part" of the land. The patent was issued "unto Henry Dalton, Ygnacio

Palomares, and Ricardo Bejar, and to their heirs," for "the tract of land known by the name of San Jose, embraced and described in the foregoing survey", but with a reservation that neither the confirmation nor the patent "shall affect the interest of third persons; to have and to hold the said tract known by the name of San Jose, with the appurtenances, unto the said Henry Dalton, Ygnacio Palomares and Ricardo Bejar, and to their heirs and assigns forever, with the stipulation aforesaid" (pp. 606-7).

In denial of the contention that the patent inured to the benefit of the respective grantees "according to their respective interests as set off to them in severalty in the alleged partition made under Mexican authority before the treaty", the Supreme Court of California held that no such partition had in fact been made by any judgment of a competent Mexican tribunal, and that the rancho was held and owned by the three successors in interest of the original patentees "as tenants in common, each owning an *undivided* third" of the land (p. 607).

The suit was brought here by Writ of Error to the Supreme Court of the State. The plaintiffs in error stood on the alleged Mexican partition, and its allotments in severalty. A motion to dismiss for want of jurisdiction was interposed, and this, on the ground that no federal question was involved (p. 607).

This court held that no federal question was involved.

"The only question is, whether such partition was made, and upon that, the decision of the state court is final, and not subject to review. It drew in question no Act of Congress, nor any authority exercised under the Constitution or laws of the United States and therefore the decision of the state court could not be opposed either to the laws or to any authority exercised under the laws of the United States" (p. 612).

The state court, it is pointed out,

"decided no question of federal law, but only that the legal effect of what had been done was not such as was required to bind the parties by the partition. In this particular, the case stands precisely as it would if, instead of a partition under the form of a judicial proceeding, one had been made by the voluntary conveyances of the parties after the original grant and before the treaty" (p. 611).

A court of equity could give full effect to what was done by decreeing the necessary conveyances to perfect the legal titles (pp. 611-612). There was no dispute "about the construction of the patents or the decrees on which they rest".

"Here, the *United States* have recognized the existence of *the right of the original Mexican grantees to the land which has been patented*, and *by the patents* invested them *with any title which passed under the treaty from the Mexican Government to that of the United States*" (p. 610).

The reservation of the alleged easement should have been embodied in the decree and patent—some illustrative cases.

In the case of the Indian Easement of Occupancy, Harvey v. Barker, 126 Cal. 262, 181 U. S. 481, it was

pointed out by the Supreme Court of California that the confirmed grant to Warner, in distinction from the earlier and rejected grant to Pico, "omits entirely the clause 'not to molest (prejudicor) the Indians that thereon may be established'" (p. 265). Again, that in a case cited to support the easement, "it was *expressly* provided in that grant that 'he shall in no way disturb or molest the Indians who are established or living thereon at the present time'" (p. 268). Again, "the grant to Warner *neither reserved nor preserved* any possessory or other right or supposed right in the Indians" (p. 270). Again, "we are not permitted to go behind the patent in a case like this" (p. 271). And again: "It is claimed that Warner took his title subject to the trust or right of the Indians. Neither the *grant* nor the *patent* contains anything to support this contention" (p. 277). And finally: "The decision of the Land Commissioners and other appropriate officers of the government of the United States, holding to the effect that the land in question was, at the time it was granted, *vacant* and subject to *absolute alienation*, is *conclusive* on the defendants and all others" (p. 277).

And in this court, it was said (181 U. S., p. 490):

> "As between the United States and Warner, the patent is as conclusive of the title of the latter *as any other patent* from the United States is of the title of the grantee named therein".

And again:

> "The grant to Pico was made subject to the condition that he should 'not molest the Indians that thereon may be established'. *No such condition was attached to the subsequent grant to Warner*" (p. 498).

In Los Angeles v. Los Angeles Milling Co., 152 Cal. 645, 649, the court in speaking of the patent, issued on a confirmed Mexican grant, says: "The patent does not contain on its face any reservation or exception".

U. S. v. Osio, 23 How. 273, was concerned with the title to an island in the Bay of San Francisco, claimed, not under the law of 1824 or the regulations of 1828, but under special executive orders issued to the governor by the Mexican government. The application for the island was made to the governor in 1838. He referred it "to the military commandancy" north of San Francisco, for a report (p. 276). Mr. Justice Clifford, writing the opinion of the court, goes on to say:

> "That office was filled at the time by Mariano G. Vallejo, who accordingly reported, on the 7th day of the same month, that the island might be granted to the petitioner; but suggested that it would be well *to make an exception in the grant*, to the effect that, whenever the government might desire or find it convenient *to build a fort* on the principal height thereof, it should not be hindered from so doing. With that report before him, the governor, on the 19th day of February, 1838, made a decree, wherein he states that he had concluded to grant to the petitioner the occupation of the

> island in question, 'to the end that he may make such use of it as he may deem most suitable, to build a house, raise stock, and do everything that may concern the advancement of the mercantile and agricultural branches—*upon the condition that, whenever it may be convenient, the government may establish a fort thereon*'" (p. 276).

Mr. Justice Clifford observes:

> "All that the decree purports to grant to the petitioner, in any view which can be taken of it, is the right or license to occupy the island for the purposes therein described, subject to the right of the government to enter at any time and appropriate the premises as a site for a military fort" (p. 277).

The decree of confirmation, made and entered by this court in *Mitchel v. United States,* 9 Pet. 711, 761, is illustrative. It provides:

> "And this court doth, in like manner, order, adjudge, determine and decree, that the title of the petitioner to so much of the tract (describing it) as shall not be included *in the exception hereinafter made,* is valid by the laws, treaty, and proceedings as aforesaid; with the *exception* of so much of the last mentioned tract *as includes the fortress of St. Mark's and the territory directly and immediately adjacent and appurtenant thereto,* which are hereby *reserved for the use of the United States*" (p. 761).

Again:

> "If the boundaries of the said cession cannot now be ascertained, then the adjacent lands which were considered and held by the Spanish government, or the Commandante of the Post,

> as annexed to the fortress for military purposes, shall still be considered as annexed to it, and *reserved with it for the use of the United States"* (p. 762).

If no evidence be available to fix the extent of these reserved lands, "then so much land shall be comprehended *in this exception* as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies" (p. 762).

If proof of the military usage be not at hand, then it is decreed that a description of territory, set forth by courses in the decree, "shall be, and the same is hereby declared to be, *the territory reserved* as adjacent and appurtenant to the fortress of St. Mark's, and as such *reserved for the use of the United States"* (p. 762).

The decree of the lower court—which had rejected the grant—was reversed "in all matters and things therein contained, *with the exception aforesaid"*, and this court, "proceeding to render such decree as the said court ought to have rendered", adjudges the confirmation of the claim "to all the land embraced therein, *except such part as is hereinabove excepted"* (p. 762).

The clerk of this court is directed to certify the decree to the surveyor general of Florida, with directions to lay off the lands in accordance with the grant, *excepting,* nevertheless, *such part* of the tract * * * as is hereby declared to be the territory of the United States, *pursuant to the exception hereinbefore mentioned";* and as to the tract

subject to the exception, "to lay off the same, so soon as the extent of the land, *herein excepted and reserved for the use of the United States,* shall be ascertained in the manner hereinbefore directed" (p. 763).

And it is further adjudged by this court, that the extent and boundaries of the land *"thus excepted and reserved"* shall be determined by the Superior Court of the Middle District of Florida in such manner and by such process as is prescribed by the Acts of Congress relating to the claims of lands in Florida (p. 763).

In Lynch v. Bernal, 9 Wall. 315, the lands involved were within the corporate limits of the City of San Francisco. Lynch deraigned his title from the City of San Francisco, under the Van Ness Ordinance of that city, and the confirmatory act of the state legislature—depending ultimately on the decree of confirmation and patent to the city, as the successor of the former pueblo. Bernal deraigned his title from a Mexican grant, made in 1834 by the governor of California, and duly confirmed, surveyed and patented.

> "The position of the defendants is, that, by the possession of the party through whom they claim, and the operation of the Van Ness ordinance, they acquired an older and superior title," said this court, "to that ceded to Bernal by the grant of Figueroa (Mexican governor). This position assumes that the city possessed the title to the premises in controversy at the time the ordinance was passed; whereas, though the city was then asserting, in the courts of the

United States, her claim to four square leagues, the boundaries of the tract were not defined, nor was it known *what exceptions and reservations might be* made from the claim when it should be considered and finally determined. Whoever received deeds from the city, or asserted title to parcels of land under the Van Ness ordinance, whilst the claim of the city to the land was thus pending, necessarily held whatever they took, subject to the final determination of the claim. Their title stood or fell with the claim" (p. 324).

The court continues:

"Now, when the final decree upon the claim was made, *there were excepted* from the tracts confirmed, *such* parcels of land as had been, *by grants from lawful authority,* vested in private proprietorship, and had been finally confirmed to parties claiming under said grants by the tribunals of the United States, or should thereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings then pending therein for that purpose. *This exception* is not limited to parcels of land claimed under perfect grants, as contended by counsel, but includes all parcels claimed by private parties under grants from the authorities of the former government, the claims to which had been subjected, or might in proceedings then pending, be subjected, to the examination of the tribunals of the United States, and had been or might be, confirmed by them.

"*The object of the exception* was *to prevent any possible controversy* between parties claiming under the city, and parties holding under grants adjudged valid by the tribunals of the United States; and to protect the latter *from being harassed by further litigation respecting their title.*"

Again:

> "The *exception* excludes, therefore, from confirmation to the city, the land granted to Bernal, and the Van Ness Ordinance did not operate to pass any right or interest in the demanded premises to the party through whom the defendants claim" (pp. 324-5).

The language of the decree of confirmation to the city, is set forth by the court. "In May, 1865, the Circuit Court confirmed the claim to four square leagues, *subject to the following deductions, namely:*

> "Such parcels of land as have been heretofore *reserved or dedicated to public uses by the United States;* and *also* such parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings pending therein for that purpose; all of which said *excepted* parcels of land are included within the area of four square leagues, above mentioned (those described as confirmed), *but are excluded from the confirmation to the city"* (pp. 318-319).

Grisar v. McDowell, 6 Wall. 363, was an action of ejectment brought by Grisar against General McDowell to recover a tract of land in San Francisco, lying within the Presidio or military reservation as declared and delimited by President Fillmore in December, 1851.

Grisar claimed, as owner in fee, under title from the City of San Francisco. McDowell defended as

an officer of the United States, claiming possession as of public property of the United States reserved for military purposes.

In December, 1854, on a petition for confirmation presented by the city in July, 1852, the Board of Land Commissioners confirmed the claim of the city to a portion of the land within this reservation, and within that portion, so confirmed, the demanded premises were embraced. In June, 1855, under the Van Ness ordinance of that year, ratified subsequently by the state legislature, whatever title the city had to the premises, as of January 1, 1855, passed to the grantor of the plaintiff (pp. 365, 366).

> "In stating the City's title, it has been said that the Board of Land Commissioners, in December, 1854, confirmed the claim of the city to a part of the four leagues claimed by it as a pueblo, *which part included these premises.* If the matter had stopped there, the case of the plaintiff might have been free from question. But it did not stop there. The sequel was thus:
>
> 'In March, 1856, a transcript of the proceedings and decision of the board was filed in the district court of the United States; this operating, under the statute of August 31, 1852, as an appeal by the party against whom the decision was given. *Both* city and United States in this case considered the decision as against them, and *both* gave notice of their intention to appeal. The appeal of the United States was, however, on notice of the attorney general and the stipulation of the district attorney, *dismissed,* and the *city alone prosecuted its appeal*' " (p. 367).

Pending this appeal by the City, the case was transferred, by act of Congress, to the Circuit Court of the United States, and that court, in May, 1865, confirmed the claim of the city to the four leagues "*excepting,* among others, such parcels of land as had been *previously reserved or dedicated to public uses by the United States,*—meaning by this, the tracts reserved as above mentioned, by the then President, Mr. Fillmore" (p. 368). The United States appealed from this decree. Thereafter, Congress relinquished (Act of March 8, 1866, 14 Stat. 4) the rights of the United States to the land confirmed, "subject, however, to the reservations and exceptions designated in that decree"; and accordingly the appeal of the United States was dismissed (p. 368).

Now, then, it will appear from the decision of this court, that if the City of San Francisco had remained content with the decree of the Board of Land Commissioners, which confirmed to the City a part of the military reservation, including the demanded premises, that decree would have "closed the controversy between the city and the United States", and would have carried the land in question to the city and to the plaintiff, Grisar, its subsequent grantee;—and this, *notwithstanding* the previous reservation—not a potential reservation, but a reservation actually made by the President for military purposes.

At the date of the conquest July 7, 1846, there was a pueblo "of some kind" in San Francisco, and a

municipal organization going back to the year 1835. This pueblo had some claim, legal or equitable, to some interest in lands within the four square leagues. It had been the general policy of Spain and Mexico to assign lands to the pueblos, for the use and benefit of the town and its inhabitants.

> "Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants, and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country. All lands within the general limits stated, *which had previously become private property*, or were *required for public purposes*, were reserved and excepted from the assignment" (pp. 372-3).

It was from the vacant public lands, that the assignment was made to the public establishment or pueblo, for its municipal purposes, and in trust for the use of its inhabitants. No more under such an assignment, than under a grant in colonization or settlement, pursuant to the law of 1824 and the regulations of 1828, was the right of private property impinged upon. It was from the ungranted lands that the assignment was made. In the learned and elaborate opinion of the present Chief Justice, in U. S. v. Santa Fe, 165 U. S. 675, 709, the language just quoted from Grisar v. McDowell, supra, is reproduced, and the Chief Justice goes on to say:

> "The general theory of the Spanish law on the subject indicates that, even after a formal designation, the control of the outlying lands, to which a town might have been considered en-

titled, was in the King, as the source and fountain of title, and could be disposed of at will by him, or by his duly authorized representative, *as long as such lands were not affected by individual and private rights.*"

And further, by the Chief Justice (p. 711):

"It was doubtless a consideration of the state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town, *and undisposed of and not the subject of private grant* (to all of which rights the United States succeeded as successor of the King of Spain and the Government of Mexico), which caused Congress, in enacting the laws of 1864 and 1866, to carve out of the claim of San Francisco such land for public purposes as it saw fit, to authorize further reservations to be made within a period of one year, and to subject the lands relinquished to specific trusts imposed not alone upon the municipality of San Francisco, but also upon the general assembly of California."

The court proceeds in Grisar v. McDowell (p. 373):

"Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions, and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned. Even after the assignment, the interest acquired *by the pueblo* was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require *their* pos-

> session of the fee. The interest, as we had occasion to observe in the case already cited (Townsend v. Greeley, 5 Wall. 336), amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. And this *limited right* of disposition and use was in all particulars subject to the control of the government of the country" (p. 373).

But no assignment of lands had been made to the pueblo of San Francisco under the former government. Hence the necessity of an examination and confirmation, under the law and procedure of the new government, to turn the imperfect right of the pueblo "into an absolute and indefeasible estate". That was accomplished by the decree of confirmation (p. 374), and by the confirmatory action of Congress, the organ of the national authority (pp. 378-9).

Having regard, now, to the limited character of the pueblo right, and to the ultimate and overruling jurisdiction of the general government, except as against intervening private rights of ownership, this court determines, as the result of a decree of confirmation under the act of March 3, 1851, that a reservation made by the President of the United States for military purposes, must abide the event of the proceedings in confirmation, and is controlled by the decree therein made of the commissioners and the courts. The United States, it has been seen,

dismissed its appeal from the decree of the board. That decree confirmed to the City a part of the military reservation, including the premises claimed by Grisar. The City insisted on going on with its appeal, instead of accepting the leave granted by the district court to proceed upon the decree of the board as upon a final decree. "This kept open the whole issue with the United States", for the so-called appeal was really a suit *de novo* (p. 375). To quote the language of the court (pp. 374-5):

> "The counsel of the plaintiff (Grisar), contend, that this decree (of the Board) *closed the controversy* between the city and the United States as to the lands to which the claim was confirmed. But in this view they are mistaken. *Had the city accepted* the leave granted, withdrawn her appeal, and proceeded under the decree as final, *such result would have followed.* But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. This kept open the whole issue with the United States."

It was consequently held that the City was bound by the decree of the circuit court, in the proceeding *de novo* which it had insisted on prosecuting, and that, by the express terms and exceptions of that decree, the land reserved by President Fillmore, was excluded from the operation of the decree of confirmation. Such reserved lands remained in the United States, no title thereto vested in plaintiff, and his action to recover possession failed.

So much, too much, for a decree of confirmation and a patent, passing the fee, and containing no reservations. Perhaps this statement is not precisely accurate; for the patent here does contain a reservation, but not the one desired. Its granting clause reads:

> "Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the Act of Congress aforesaid of 3d March, 1851, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said Archibald C. Peachy and William H. Aspinwall, *and to their heirs*, the tract of land embraced and described in the foregoing survey, *but with the stipulation* that in virtue of the 15th section of the said Act the confirmation of this said claim and this patent shall not affect the interests *of third persons.* To have and to hold the said tract, with the appurtenances, unto, the said Archibald C. Peachy and William H. Aspinwall, *and to their heirs and assigns forever, with the stipulation aforesaid*" (Tr. p. 33).

So much, then, and too much, for the matter of reservations. "We do not think it necessary", this court has said (Pumpelly v. Green Bay Company, 13 Wall. 166, 182) to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee *by patent without reservations*, it retains no right to take that land for public use *without just compensation*".

III.

IN NO EVENT, UNDER THE ACT OF MARCH 3, 1891, 26 STAT. 1095, 1099, CAN THE PLAINTIFF GO BEHIND THE PATENT.

Section 8 of the Act reads:

> "That suits by the United States to vacate and annul any patent heretofore issued, shall only be brought within five years from the passage of this Act; and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent."

The patent here, was issued on June 11, 1869 (Tr. p. 33).

In Harvey v. Barker, 181 U. S. 481, 490, it was said:

> "As between the United States and the Indians, their failure to present their claims to the Land Commission within the time named, made the land, within the language of the statute, 'part of the public domain of the United States'."

The Indian easement of occupancy, as between the Indians and the United States, passed into the public domain, and merged in the fee.

> "If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple *or possessory merely*, derived from the Mexican government; under the Act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation" (Harvey v. Barker, 126 Cal., p. 274).

And so, here, the "easement" alleged is "a title or right to property * * * possessory merely, derived from the Mexican government", and it is a title or right to property in public lands, if in anything; so far forth as it is claimed to exist, it is an interest issuing out of "these lands", the "lands of the nation", the public lands (Law of 1824, supra). The reservation of public land for military purposes is a familiar and typical thing in the administration of the public lands; such was the reservation upon which General McDowell stood in the Presidio case. Congress may establish a reserve, it may disestablish it, it may release it. These are rights incident to its proprietorship of the public lands (Light v. U. S., 220 U. S. 523, 537).

U. S. v. Chandler Dunbar Co., 209 U. S. 447, was a bill in equity by the United States to remove a cloud from its title to two islands in the Sault Ste Marie, between Lake Huron and Lake Superior. The defendant claimed the land under a patent from the United States, dated December 15, 1883. The United States replied,

> "that the patent was void *because the land had been reserved for public purposes*, and that even if it was valid, the islands did not pass. The defendant denied that the land was reserved, and, further, interposed the statute of limitations, above quoted, of March 3, 1891."

This court assumed that the land had been reserved, and turned the decision on the Act of March 3, 1891.

"The statute just referred to", said the court, "provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act', that is to say, from March 3, 1891. This land, whether *reserved* or not, *was* public land of the United States, and in kind open to sale and conveyance through the Land Department. U. S. v. R. R. Co., 165 U. S. 463, 476. The patent had been issued in 1883, by the President in due form and in the regular way. Whether or not *he* had *authority* to make it, the *United States had power to make it,* or to *validate it when made,* since the *interest* of the United States was the *only one* concerned. We can see no reason for doubting that the statute, *which is the voice of the United States,* had that effect. It is said that the instrument was void, and hence was no patent. But the statute pre-supposes an instrument that might be declared void. When it refers to '*any* patent heretofore issued', it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents, it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599.

"In form, the statute only *bars suits* to annul the patent. But statutes of limitation with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Liffingwell v. Warren, 2 Black, 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place."

Northern Pacific Ry. Co. v. U. S., 227 U. S. 355, was a case under the act of March 2, 1896 (29 Stat. 42, c. 39). This act related to railroad or wagon road grants. It provided that suits brought by the government to vacate and annul any patent to lands theretofore erroneously issued under such a grant, should only be brought within five years from the passage of the act, and, as to patents issued after the passage of the act, should only be brought within six years (p. 367).

The Yakimas, an Indian tribe, by treaty with the United States, had ceded and conveyed to the United States a tract of land, explicitly described, reserving, however, by Article 2 of the treaty, the land included within specified boundaries (p. 356). It was to this land, so reserved and belonging to the tribe, that the railroad company laid claim under its patent. It was held that the limitation of the Act of 1896 applied only to the *public lands of the United States,*—not to the lands of an Indian tribe (p. 367). The patent was therefore vacated, as having been "erroneously" issued for lands belonging, not to the United States, but to the Indians. "It must be borne in mind", this court said, "that the Indians had the primary right. The rights the government had are derived *through the cession from the Indians*" (p. 366).

LaRoque v. U. S., 239 U. S. 62, turned on the validity of an allotment of Indian lands, tribal lands, to an individual member of the tribe.

The land in question was part of the White Earth Indian Reservation in Minnesota. Under the Act of January 14, 1889, 25 Stat. 642, known as the Nelson Act, a trust patent had been issued to a Chippewa Indian, Vincent LaRoque by name, entitling him to an individual allotment under that act. He died shortly after 1889, "without an allotment being selected by or for him" (p. 64). After his death, an application for allotment was made in his name; and in his name, the allotment was accordingly made, and the trust patent issued,—all as though he were a living man. His son, Henry LaRoque, himself entitled, as a Chippewa Indian, to an individual allotment out of the tribal land, claimed as well, in his status of heir at law, the additional land which had issued under the allotment and trust patent in the father's name.

The Secretary of the Interior had ruled that, under the Nelson Act, there could be no allotment except to living Indians (p. 64)—notwithstanding an eminent military authority to the effect "that there are no good Indians except dead Indians". This court held, on a view of the Nelson Act, that its terms "contemplated only selections on the part of living Indians acting for themselves or through designated representatives", and "that the incidents of tribal membership, like the membership itself, are terminated by death" (p. 66). In closing, the court alludes to Northern Pacific Ry. v. U. S., supra, and remarks that "this trust patent was not issued for *public lands of the United States,*

but for reserved Indian lands to which the public land laws had no application" (p. 68). And it may be pertinent to notice a remark of the court touching the decree itself; "It may be well to observe in passing", it is said, "that the Circuit Court of Appeals directed *that there be embodied in the decree* a provision that the government holds the lands in the same way it held them before the patent was issued, that is, as *reserved* Indian lands" (p. 68).

U. S. v. Whited, 246 U. S. 560, was a suit to recover, not any public *lands* covered by a patent, but the *value* of such lands, where the patent was alleged to have been procured from the government by fraud.

The statute of limitations, as this court looked at it,

> "relates to the remedy, and *in terms* applies only to *one* remedy, that for annulling the *patent*. The right of the government, asserted in this case, really springs from the *fraudulent obtaining* of the patent, not from the patent itself" (p. 561).

And further:

> "The statute was passed to promote prompt action for annulling patents where cause therefor was believed to exist, and *to make titles resting upon patents dependably secure* when the period of limitation should expire. As might well be anticipated, therefore, this statute, originating in such conditions, was limited in its terms to suits to vacate and annul patents,

without any reference being made to suits to recover *the value* of the land when patents were *fraudulently* obtained" (p. 562).

And again:

"The *omission* of language barring the right of the government to recover *the value* of lands to which a patent had been *fraudulently* obtained, was intentional and deliberate, to the end *that patent titles might be made secure,* but that persons who had *defrauded* the government should not be protected by the act in the enjoyment of their ill-gotten gains" (p. 563).

Reference is then made to the Chandler-Dunbar case:

"The support for the contention of the defendants in error, contrary to this conclusion, which they claim to find in U. S. v. Chandler-Dunbar Water Power Company, 209 U. S. 447, is based upon the statement that by the statute the patent 'is to have the same effect against the United States that it would have had if it had been valid in the first place', but that is merely an emphatic way of saying that the *title* is made *good*" (p. 563).

We are not concerned, in the case at bar, with *a damage suit* by the United States to recover *the value* of land out of which it has been defrauded by a patentee. If the patent here, in its terms and scope, was "erroneously" issued, the United States is now foreclosed to raise that question.

It is submitted:

I. The grant to Carrillo, as an original question, was not subject to the alleged easement of occupancy for military and naval purposes.

II. The decree of confirmation and the resulting patent ascertained and settled the title of this respondent conclusively between the United States and respondent.

III. In no event, under the Act of March 3, 1891, 26 Stat. 1095, 1099, can the plaintiff go behind the patent.

The decree of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 524 and 525.—October Term, 1920.

The United States of America, Plaintiff in Error, 524 vs. The Coronado Beach Company. Same, Appellant, 525 vs. Same.	In Error to and Appeal from the District Court of the United States for the Southern District of California.

[March 28, 1921.]

Mr. Justice Holmes delivered the opinion of the Court.

These cases arise out of a proceeding brought by the United States under the Act of July 27, 1917, c. 42, 40 Stat. 247, for the double purpose of ascertaining the rights of private parties in North Island in the harbor of San Diego, California, and of condemning the whole of said island for public purposes after the value of such rights has been fixed and paid into Court. The proceeding was begun by a bill in equity against the Coronado Beach Company. In its answer that Company alleged title to the whole island, and after a hearing obtained a decree in its favor, subject to the question of the rights of the United States brought up by the appeal in No. 525. The case then was transferred to the law side, the value of the plaintiff's island was assessed by a jury, and a judgment was entered that upon payment of $5,000,000 into Court within thirty days the United States might have a final order of condemnation. The writ of error in 524 presents the questions raised in this stage of the case.

The title of the Coronado Beach Company is derived from a Mexican grant of May 15, 1846, to one Carillo, a Mexican citizen, the Company having succeeded to his rights. At this point it is necessary to mention only that Carillo is given the right to enclose the land 'without prejudice to the crossings, roads, and servitudes'.

The grant was under a law of August 18, 1824, by the fifth section of which "If, for the defence or security of the nation, the Federal Government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the General Congress, or during its recess with that of the Government Council." Hall, Laws of Mexico, 148, § 492. The United States interprets this as a reservation of power against all persons, as one of the servitudes to which the Carillo grant was subject, and as a sovereign right to which it succeeded when the land became territory of the United States. We cannot accept so broad an interpretation. We need not repeat the discussion in *Arguello* v. *United States*, 18 How. 539, wherein it was laid down that the first eight sections apply wholly to colonists and foreigners. The decision immediately concerned the fourth section of the law, but the ground for the construction given to it was that the others obviously were limited as stated and that there was no reason for giving to the fourth a greater scope. Moreover the second section states that "The objects of this law are those national lands which are neither private property nor belong to any corporation or pueblo and can therefore be colonized." *United States* v. *Yorba*, 1 Wall. 412. It is hardly credible that section five should have been intended to reserve the right to displace private owners, and wholly incredible that it reserves the right to do so without compensation, especially when it is noticed that by the law of April 6, 1830, the value of lands taken for fortification, &c., is to be credited to the States. *Camou* v. *United States*, 171 U. S. 277, 284, 285. Hall, Laws of Mexico, 108, § 291.

The more serious questions arise on the writ of error and concern primarily the extent of the grant; the main dispute being whether the Company owns the tide lands in front of the upland of the island. Carillo's petition states as its ground that he is in want of proper land for the breeding of cattle and horses and asks the grant for a cattle farm of the island or peninsula in question, bounded substantially as in the subsequent grant, viz: on the north by the Estero of San Diego towards the town, east by the end of the rancho of Don Augustin Meliso, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. On April 20, 1852, Billings and

others then holding the title petitioned the Commissioners to settle Private Land Claims, appointed under the Act of March 3, 1851, c. 41; 9 Stat. 631, to confirm to them this tract of land. The petition was rejected by the Board but on appeal the title was declared good and confirmed by the District Court of the United States. The decree stated the boundaries on the north, east and south as in the original grant, and "west by the anchorage for ships according to the documents of title and map to which reference is had". This decree was filed on January 12, 1857; on May 7, 1867, after an appeal to this Court had been dismissed, there was a substitution of Peachy and Aspenwall as parties, and on June 11, 1869, a patent was issued reciting the decree, a return with a plat of a survey approved under § 13 of the Act of 1851, and giving and granting to them the land described in the survey. The Mexican map is not in the record and is not material since the plat accompanying the patent of the United States shows the line marking the 'Anchorage for Ships', which includes the tide lands in dispute.

The jurisdiction of the decree and the validity of the patent so far as they cover the tide lands is denied by the United States, a special reason being found in the fact that California became a State in 1850 and thereby acquired a title to the submerged lands before the date of the decree. But the title of the State was subject to prior Mexican grants. The question whether there was such a prior grant and what were its boundaries were questions that had to be decided in the proceedings for confirmation and there was jurisdiction to decide them as well if the decision was wrong as if it was right. The title of California was in abeyance until those issues were determined, as the decree related back to the date of the original grant. The petitioner asked a confirmation of the tract conveyed to Carillo. The grant to Carillo was bounded 'west by the anchorage for ships' and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for

its grant and it cannot now be collaterally impeached. *Knight* v. *United Land Association*, 142 U. S. 161. *San Francisco* v. *Le Roy*, 138 U. S. 656. *Beard* v. *Federy*, 3 Wall. 478. It was suggested that the bill might be regarded as a direct attack upon the patent; but this probably was an afterthought and in any event the attack would be too late. Act of March 3, 1891, c. 561, § 8; 26 Stat. 1099. *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 450.

A subordinate objection is urged to the admission of maps or drawings showing the adaptability of the island to a great system of improvements possible if the Coronado Beach Company owned the submerged land. It is urged that such improvements were speculative, remote, and not shown to be commercially practicable. But the drawings were admitted only to illustrate the opinion of the witness as to value and were explained as meaning no more. If the reasons for his opinion were inadequate they detracted from the weight of his testimony but were not inadmissible on that account.

Finally it is contended that the Government took only the upland. But the Act of 1917 provides for the taking of 'the whole of North Island' and for 'the determination and appraisement of any rights private parties may have in said island', and the bill follows the act and prays that if the defendant company has any right to the tract or any part thereof the right 'and the whole thereof' may be 'appraised and condemned.' We discover no error in the proceedings below.

Decree and judgment affirmed.

Mr. Justice CLARKE took no part in the decision of this case.

A true copy.

Test:

Clerk Supreme Court, U. S.